No. 2213

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

ALFRED D. DANIELS,

Appellant,

vs.

RALPH E. BUTLER and D. W. DINEEN,

Appellees.

Upon Appeal from the United States District Court for the District of Oregon

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TRANSCRIPT OF RECORD.

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Names and Addresses of Attorneys Upon This Appeal:

For the Appellant:

PLATT & PLATT and HUGH MONTGOMERY,
Board of Trade Bldg., Portland, Oregon

For the Appellees:

ANGELL & FISHER,
Fenton Bldg., Portland, Oregon

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In the District Court of the United States for the District of Oregon.

Be it Remembered, That on the 17 day of May, 1912, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Bill of Complaint, in words and figures as follows, to wit:

[Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

ALFRED D. DANIELS,

Plaintiff,

vs.

RALPH E. BUTLER and D. W. DINEEN,

Defendants.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF OREGON:

A. D. Daniels, a citizen and inhabitant of the State of Wisconsin, residing at Rhinelander in said state, with leave of court first had and obtained, brings this, his amended bill of complaint, against Ralph E. Butler, a resident and inhabitant of the state of Oregon, residing at Dallas, in said state, and D. W. Dineen, a resident and inhabitant of the State of California, and residing at Cloverdale in said state.

And thereupon your orator complains and says:

I.

That at all times herein mentioned plaintiff was and is a resident and inhabitant of the State of Wis-

consin, residing at Rhinelander in said state.

II.

And thereupon your orator further shows unto your Honors:

That at all times herein mentioned defendant, Ralph E. Butler, was and is a resident and inhabitant of the State of Oregon, residing at Dallas in said state, and that defendant D. W. Dineen was and is a resident and inhabitant of the State of California, residing at Cloverdale in said state.

III.

And thereupon your orator further shows unto your Honors:

That on the 12th day of April, 1902, and immediately prior thereto, the Aztec Land and Cattle Company, Ltd., a corporation, was the owner in fee simple, free of any lien or incumbrances, of that certain property located in the Territory of Arizona, and particularly described as follows, to wit:

> All of sections twenty-five, twenty-seven, and twenty-nine, township sixteen north, range ten east; and the southeast quarter of section three, township nineteen north, range nine east, G. & S. R. M.

and was the owner in fee simple of said property described in paragraph III of this amended complaint, up until the 2nd day of February, 1904.

IV.

And thereupon your orator further shows unto your Honors:

That on or about the 12th day of April, 1902, the

said described lands, mentioned in paragraph III of this amended bill of complaint, were included within the limits of the San Francisco Mountains Forest Reserves, pursuant to a proclamation of the President of the United States made on or about the 12th day of April, 1902, which said lands were then, and still are, non-mineral lands.

V.

And thereupon your orator further shows unto your Honors:

That on or about the 8th day of February, 1904, that certain property situated within the District of Oregon, located in the County of Klamath in the State of Oregon, and particularly described as follows, to wit:

> The south half of the southwest quarter, section twelve, and the northwest quarter of the northwest quarter, and the southwest quarter of the northwest quarter, section thirteen, township thirty-seven south, range ten east of the Willamette Meridian,

was surveyed, unappropriated, and vacant public land of the United States, returned and characterized upon the official records of the United States as non-mineral land, free and open to entry and settlement under and in accordance with the laws of the United States governing the acquisition of public lands.

VI.

And thereupon your orator further shows unto your Honors:

That on or about the 4th day of June, 1897, the Con-

gress of the United States passed an act entitled: "An act making appropriation for sundry civil expenses of the government, for the fiscal year ending June 30, 1898, and for other purposes:" which act provides, among other things, as follows, to wit:

> "That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the tract selected: Provided further, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claim."

VII.

And thereupon your orator further shows unto your Honors:

That on or about the 2nd day of February, 1904, the said Axtec Land and Cattle Company, Ltd., a corporation, acting by A. L. Veazie, its attorney in fact, did, in accordance with the provisions and requirements of the act of Congress of June 4, 1897, set

forth in paragraph VI of this amended complaint, relinquish and convey unto the United States of America those certain tracts of land hereinbefore described in paragraph III of this amended complaint, and recorded the deed of conveyance in the office of the recorder of the county in which the said lands are situated, and subsequently, and on the 8th day of February, 1904, filed with the Register and Receiver of the United States land office at Lakeview, Oregon, the said deed so recorded, together with a full, true and correct abstract of title of the lands so relinquished, duly certified as such by the county recorder of the county in which the lands are situated, which abstract of title showed him to be the owner in fee simple of said lands, free and clear of any lien or incumbrances, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time selected in lieu of said lands so relinquished,

> The south half of the southwest quarter, section twelve, and the northwest quarter of the northwest quarter and the southwest quarter of the northwest quarter, section thirteen, township thirty-seven south, range ten east of the Willamette Meridian,

together with other lands, which selection so made was prior in time to the selection or entry of any other person or persons whomsoever, and, by virtue of said selection, there was initiated a right and interest prior in time and superior in right as against all persons whomsoever.

VIII.

And thereupon your orator shows unto your Honors:

That regardless of said selection so made as alleged in paragraph VII of this amended complaint, the defendant Ralph E. Butler did, on September 3, 1906, attempt to make a timber and stone entry upon the land described in paragraph VII of this amended complaint.

IX.

And thereupon your orator further shows unto your Honors:

That on or about the 28th day of June, 1902, the state of Oregon filed upon the said tracts so selected, together with certain other lands, certain instruments purporting to be school indemnity lists, which lists were numbered Lists 178 and 188, respectively, which said lists were duly and regularly accepted and filed by the Register and Receiver of the United States land office at Lakeview, Oregon, and thereupon were regularly transmitted to the Commissioner of the General Land Office of the United States government at Washington, D. C., to await the acceptance and approval of the land department of the United States government, but that, owing to the invalid character of the base lands tendered in said lists, the said lists were held for cancellation, and were subsequently cancelled upon relinquishments of said lists filed on behalf of the State of Oregon, on the 8th day of February, 1904.

X.

And thereupon your orator further shows unto your Honors:

That prior to the said cancellation of said school indemnity lists 178 and 188, and before any action whatsoever had been taken by the proper officers of the land department of the United States, except said Register and said Receiver, relative to the acceptance and rejection of the said indemnity lists, the State of Oregon, acting through the officers of the Oregon state land board, sold to various bona fide purchasers, for value, the timber lands upon which the said school indemnity lists 178 and 188 had been filed, and the said state had not at the time of such sale, nor has it at any time since ever acquired or owned any right, title, or interest in or to the said lands upon which the said lists were filed, including those lands more particularly described in paragraph V of this amended bill of complaint, which said lands described in said paragraph V were, for a valuable consideration, and in good faith, and without any knowledge whatsoever of the irregularity of the proceedings which had taken place in connection with the sale thereof, or of the invalid character of the base lands which were tendered to the Federal government as the basis for the said selection by the state of Oregon, purchased from the said State of Oregon by the plaintiff herein.

XI.

And thereupon your orator further shows unto your Honors:

That subsequently and upon the discovery of the

fact that all the proceedings in connection with the attempt to acquire said lands by filing of said lists 178 and 188, so filed as aforesaid, and more particularly those lands hereinbefore described in paragraph V of this amended bill of complaint, were irregular, and that by virtue of the filing of said lists the State of Oregon had acquired no interest and did not then have any right, title or interest in or to the said lands so selected, owing to the invalid character of the base land which had been tendered in exchange therefor, and the further fact that the said selected land had, neveretheless, been sold by the state of Oregon to many innocent purchasers for value, the State of Oregon, acting through the Honorable George E. Chamberlain, its governor, entered into negotiations with the Department of the Interior of the United States, for the purpose of arriving at some arrangement wherein and whereby the interest of these bona fide purchasers from the state might be protected, and as a result of such negotiations, and on or about the 17th day of October, 1903, a letter was promulgated and transmitted to the governor of the State of Oregon by the Honorable Secretary of the Interior of the United States, of which letter the following is in part substantially a copy, to wit:

> "It (the state) may within sixty days allowed for appeal amend its selection by the substitution of a valid base, or, if unable to furnish such a base, it may, upon receipt of notice that the selection is held for cancellation, make a formal relinquishment of the

selection, and give same to its grantee. While the selection is of record uncancelled the land is segregated thereby, and no right can be acquired by the presentation of an application therefor (29 L. D. 29), but the purchaser holding the state's relinquishment may present it with his application, and thereby secure the right of entry."

XII.

And thereupon your orator further shows unto your Honors:

That thereafter and in accordance with the terms of the arrangement thus agreed upon, as evidenced by the said letter of the Secretary of the Interior, the said lieu selection so made as alleged in paragraph VII of this amended bill of complaint was made by the said Aztec Land and Cattle Company, Ltd., a corporation, by A. L. Veazie, its attorney in fact, in the interest and for the benefit of the plaintiff herein, and for the purpose of protecting the interests of the plaintiff in and to said selected land acquired by virtue of the purchase so made by the plaintiff from the State of Oregon, as alleged in paragraph X of this amended complaint, and at the time of making said lieu selection so made as alleged in said paragraph VII, and on the 8th day of February, 1904, the said lieu selector, the said Aztec Land and Cattle Company, Ltd., by A. L. Veazie, it attorney in fact, presented, simultaneously with and together with the selection as in paragraph VII of this amended complaint alleged, a relinquishment from the State of Oregon

of all its right, title and interest in and to the said selected land, which said relinqushment was made by the State of Oregon in the interest and for the benefit of the plaintiff herein, as grantee, which relinquishment is the same relinquishment referred to in paragraph IX hereof.

XIII.

And thereupon your orator further shows unto your Honors:

That the said forest lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, was in all respects regular and in accordance with the requirements of said Act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, and in accordance with the requirements of the Secretary of the Interior in his letter of October 17, 1903, hereinbefore set forth in paragraph XI of this amended bill of complaint, and the local officers of the United States land office at Lakeview, Oregon, did, on the 8th day of February, 1904, accept and file the said lieu selection, so made as aforesaid in paragraph VII of this amended bill of complaint, and, did, on the 4th day of March, 1904, and at subsequent dates, attempt to reject said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, and stated, as a basis for said attempted rejection, that the said lieu selection was in conflict with certain homestead and timber and stone applications, which were made subsequently to the 8th day of February, 1904, and subsequently to the presentation and filing of the lieu selection, together with the relin-

quishment of the State of Oregon, as alleged in paragraphs VII and XII of this amended bill of complaint.

XIV.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 8th day of April, 1904, said lieu selector and the plaintiff herein, together with other lieu selectors who had made other selections in the interest and for the benefit of the plaintiff herein, appealed from the ruling of the local officers of the United States land office at Lakeview, Oregon, by which ruling the sail local officers attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, upon which appeal the said ruling was affirmed by the Commissioner of the General Land Office at Washington, D. C., on or about the 30th day of March, 1905, and subsequently, and on or about the 25th day of October, 1905, the Honorable Secretary of the Interior of the United States, acting through the Honorable Frank Pierce, first assistant secretary, reversed the said decision and ruling of the Commissioner of the General Land Office, and directed that said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections similarly made, be allowed as of the date on which they were filed, to wit, the 8th day of February, 1904, and directed the Register and Receiver of the United States Land Office at Lakeview, Oregon, to allow said selections to remain of

record as filed.

XV.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the 6th day of December, 1905, the local officers of the United States Land Office at Lakeview, Oregon, attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections, and alleged as a ground for said attempted rejection that the land covered by said selections had been withdrawn for the purpose of what was known as the Klamath River project, and said action of the said Register and Receiver of the United States Land Office at Lakeview, Oregon, in attempting to reject said selections, was subsequently reversed by order and direction of the Commissioner of the General Land Office, made on the 23rd day of January, 1906, who ordered and directed that said lieu selection be allowed as of date February 8, 1904.

XVI.

And thereupon your orator further shows unto your Honors:

That on or about the 5th day of March, 1906, and the 11th day of June, 1906, the Register and Receiver of the United States Land Office at Lakeview, Oregon, made objections to the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, and attempted thereby to reject said lieu se-

lection referred to in paragraph VII of this amended complaint, which attempted objections were sustained on appeal by the Commissioner of the General Land Office and by the Department of the Interior, on the 20th day of June, 1906, and subsequently and on or about the 15th day of May, 1907, the Department of the Interior of the United States recalled its attempted decision of June 20, 1906, and entered an order directing the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, as of the date on which said lieu selections were filed, to wit, the 8th day of February, 1904, and ordered and directed that notice of such order be given to all parties who had made entries upon said lands subsequently to the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, which said notice was duly given as directed.

XVII.

And thereupon your orator further shows unto your Honors:

That subsequently, and as a result of the notice so given, a petition for a review of the departmental decision last referred to was filed on behalf of Archie Johnson, a claimant of part of the said lands embraced by said indemnity lists 178 and 188, which petition set forth the existence of an alleged conspiracy, averred to have been formed for the purpose of acquiring all of the said lands, in the first instance, and that the said lieu selections, so made as aforesaid, were in accordance with, and constituted a part of, said alleged

conspiracy, and that the plaintiff herein was not a purchaser in good faith of said land described in paragraph V of this amended complaint, or any part thereof, which petition for review was allowed, upon the ground that all previous hearings before the Department of the Interior, so had as hereinbefore alleged, were purely ex parte and were, consequently, not proper proceedings in which to determine the merits of the adverse claims to the lands in question, for the purpose of basing a final decision thereon, and, therefore, an order was made directing that a final hearing should be held before the Register and Receiver of the United States Land Office at Lakeview, Oregon, for the purpose of determining the respective merits of various claims to the lands embraced within the said school indemnity lists 178 and 188.

XVIII.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 25th day of May, 1908, said hearing so ordered, as aforesaid, was duly and regularly had before the Register and Receiver of the United States Land Office at Lakeview, Oregon, the plaintiff herein appearing in person and by attorneys, and the defendant, Ralph E. Butler, and other adverse claimants appearing in person or by attorneys, at which time the said Register and Receiver, after duly hearing the respective parties, attempted to hold that the various homestead and timber and stone entries hereinbefore referred to in paragraph XIII of this amended complaint and particularly the

entry of the defendant, Ralph E. Butler, which was made on the 3rd day of September, 1906, should be allowed, which decision was subsequently, and on or about the 13 day of April, 1909, reversed by the Honorable Commissioner of the General Land Office, who held that the lieu selection referred to in paragraph VII of this amended complaint, together with other selections made in the interest of the plaintiff herein, had been duly and regularly made, and should be allowed to remain intact, upon the records of the United States Land Office, as of the date on which they were filed, to wit, February 8, 1904.

XIX.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the ..... day of ..... 19....., an appeal from the decision of the Honorable Commissioner of the General Land Office, hereinbefore referred to in paragraph XVIII of this amended complaint, was taken by certain alleged homestead and timber and stone claimants, including defendant, Ralph E. Butler, to the Department of the Interior of the United States, which department, acting through the Honorable Frank Pierce, its First Assistant Secretary, found that the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, were filed simultaneously with the relinquishment and cancellation of said indemnity lists 178 and 188, to wit, on the 8th day of February, 1904, and before the attempted filing of the said al-

leged homestead and timber and stone entries, so made as alleged in paragraphs VIII and XIII of this amended complaint, and further found that the record then before said department fully showed, and every material fact supported the conclusion, that the plaintiff herein was a purchaser in good faith, free from fraud of any kind, and that the said alleged homestead and other entries, and particularly the entry of the defendant, Ralph E. Butler, were made subsequently to the 8th day of February, 1904, and after the filing of the lieu selection, so made as alleged in paragraph VII of this amended complaint, and that said lieu selection, so made as alleged in paragraph VII of this amended complaint, had been allowed by the Secretary of the Interior, as alleged in paragraph XIV and XVI of this amended complaint, and had been allowed by the Commissioner of the General Land Office, as alleged in paragraph XV of this amended complaint, and, based upon said findings, held that it was within the competency of the officers of the land department of the United States to allow the said alleged homestead and timber and stone entries to be made after the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, and the allowance of said selections, so made as alleged in paragraphs XIV and XV and XVI of this amended complaint, and further held that said lieu selections, so made and allowed, would be denied in all instances where the local officers of the United States Land Office at Lakeview, Oregon, had attempted to

allow homestead and timber and stone entries to be made, a copy of which decision is hereunto attached and marked "Exhibit A", and, by reference, incorporated in and made a part of this amended complaint.

XX.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 29th day of August, 1907, and in accordance with the ruling of the decision hereinbefore referred to in paragraph XIX of this amended complaint, a patent to the following described land, situated in the county of Klamath and State of Oregon, and particularly described as follows, to-wit:

> The south half of the southwest quarter, section twelve, and the northwest quarter of the northwest quarter and the southwest quarter of the northwest quarter, section thirteen, township thirty-seven south, range ten east of the Willamette Meridian,

was issued in the name of Ralph E. Butler, one of the defendants herein contrary to, and in violation of, the rights and equities of the plaintiff herein, and that the said patent so issued, as aforesaid, was issued by the officers of the United States government without regard to, and in contravention of, the vested rights of the plaintiff herein, and in accordance with the ruling of the Department of the Interior, as evidenced by the decision referred to in paragraph XIX of this amended complaint.

XXI.

And thereupon your orator further shows unto your Honors:

That prior to the issuance of said patent as alleged in paragraph XX of this complaint, said Ralph E. Butler, without any consideration whatsoever therefor, and with the full knowledge of the rights and equities of your orator therein, and of all the proceedings had before the Land Department of the United States, as aforesaid, and for the sole purpose of defrauding your orator, attempted to sell, transfer and convey all his right, title and interest acquired under and by virtue of his said entry and prior to the issuance of patent, to one John B. Mason and said John B. Mason received the said pretended conveyance with like knowledge of the rights and equities of your orator therein and of all the proceedings had before the Land Department of the United States, as aforesaid, and for the purpose of defrauding your orator, which said pretended conveyance from said Ralph E. Butler, to said John B. Mason was placed of record in book ....., at page ....., of the records of deeds of Klamath County, State of Oregon, and that thereafter and prior to the issuance of said patent as aforesaid, said John B. Mason, without any consideration whatsoever moving to him and with full knowledge of the rights and equities of your orator therein, and of all the proceedings had before the land department of the United States and for the sole purpose of defrauding your orator, attempted to sell, transfer and convey all his right, title and interest acquired under

and by virtue of said conveyance from Ralph E. Butler to the defendant, D. W. Dineen, which said pretended and attempted conveyance was received by said D. W. Dineen with full knowledge of the rights and equities of your orator therein and of all the proceedings had before the Land Department of the United tSates, and without the payment of any consideration therefor, and in violation of the vested rights of the plaintiff in said land and with the wrongful and unlawful purpose of wronging, cheating and defrauding plaintiff of his title to said lands, and that during all the times herein mentioned, prior to the issuance of said patent, the legal title in and to said described land, referred to in paragraph XX of this amended complaint, was vested in the United States of America, which said pretended deed from said John B. Mason to the defendant D. W. Dineen was recorded in book .....' at page ....., of the said records of deeds of Klamath County, Oregon.

XXII.

And thereupon your orator further shows unto your Honors:

That this is a suit between citizens of different states, and that the amount in controversy herein exceeds the amount of Three Thousand ($3000) Dollars, exclusive of interest and costs.

XXIII.

And thereupon your orator further shows unto your Honors:

That he has no plain, adequate, or speedy remedy at law, but only in equity.

WHEREFORE, and foreasmuch as your orator is remediless in the premises, under and by strict rules of common law, and can only have relief in a court of equity where matters of this nature are recognizable and reviewable, files this, his amended bill of complaint, and prays:

I. That the defendant, Ralph E. Butler, may be adjudged and decreed to hold said land described in paragraph V in trust for your orator, and to convey the same to your orator, and deliver to your orator any patent or other deeds of the same in his possession, and be restrained and enjoined from hereafter setting up any claim or title to said land, or any part thereof, or in any manner intermeddling therewith, or removing any timber or other product therefrom.

II. That the conveyance from the defendant, Ralph E. Butler, to John B. Mason, and from John B. Mason to the defendant D. W. Dineen, be adjudged and decreed to be of no force and effect, and, for the purpose of presenting a clear and unencumbered title in the plaintiff as against said pretended conveyance to the defendant D. W. Dineen, that the defendant D. W. Dineen be ordered, adjudged and decreed to convey said land, described in paragraph V of this amended complaint, to the plaintiff, and that in lieu of the said conveyance within a period of thirty days from the entry of the decree of this court, that the said decree be adjudged to stand as and for a conveyance in lieu of said conveyance from said D. W. Dineen to the plaintiff.

III. That the defendants may be adjudged and de-

creed to hold any timber or other product by them or their servants or agents removed from said land, or the proceeds or manufactured product from the same, in trust for your orator, and may be decreed to account to your orator for the same, or the value thereof, and to repay to your orator said value, with interest from the date of sale, if the same has been sold by the said defendants, or either of them.

IV. That upon the failure of the defendant, Ralph E. Butler, to deliver to your orator said conveyance prayed for above, and any patent or other deeds of the said land described in paragraph V, within a period of thirty days from the entry of the decree of this court, the said decree be adjudged and decreed to stand as a conveyance in lieu of such conveyance, patent or other deeds.

V. And your orator further prays: That your Honors may grant unto your orator a writ of subpoena of the United States directed to the defendants Ralph E. Butler and D. W. Dineen, therein and thereby commanding said defendants, under a certain penalty therein to be named, personally to be and appear before your Honorable Court, then and there to answer, all and singular, (but not under oath, answer under oath being expressly waived), the matters and things aforesaid, and to stand and abide by and sustain such direction and decree as shall be made herein, as to your Honors shall seem equitable and just.

VI. And your orator prays for such further relief in the premises as the nature and circumstances of this cause may require and to your Honorable Court

may seem reasonable and proper.

And your orator, as in duty bound, will ever pray.

ALFRED D. DANIELS,

By Platt & Platt and Hugh Montgomery, His Solicitors.

Hugh Montgomery,
of Counsel.

[Exhibit "A."]

D. C. M. G. B. G.

DEPARTMENT OF INTERIOR.

Washington, Feb. 17, 1910.

E--900.

Aztec Land & Cattle Company, Lt'd.
E. B. Perrin
Lieu Selectors,
A. D. Daniels,
Claimant of Beneficial Interest,
vs.
Archie Johnson, et al,
Intervenors.

The Commissioner
Of the General Land Office.

Sir:

This is the appeal of Archie Johnson, et al., intervenors, from your office decision of April 13, 1909, sustaining the claim of A. D. Daniels, beneficiary under Lieu Selections, Nos. 15016, 15017 and 18, (Serials 0714, 0715, 0716) for certain described lands in the Lakeview Land District, Oregon. Questions affecting the validity of these selections have been subject of numerous decisions of the Land Department, and a detail statement of such proceedings covering a period of more than eight years, must of necessity be set out

in detail, if the issues now presented may be properly understood.

January 28, 1902, the lands involved were selected by the State of Oregon, per school indemnity lists Nos. 178 and 188 these lists were held for cancellation by your office, because of invalid base, and were finally cancelled in March and August, 1904, upon relinquishments filed on behalf of the state. The date of the filing of these relinquishments is one of the disputed questions in this record: and while not necessarily controlling, it is in view of this case important, and will be considered on its merits in the progress of this paper.

For present statement, it will be enough to say that the local officers and your office have found that it was filed Feb. 10, 1904, whereas it is claimed on behalf of A. D. Daniels, owner of the Beneficial interest in certain Forest Lieu Selections of these same lands, that it was filed Feb. 8, 1904. However this may be, the Forest Lieu Selections in question were filed on said last named date Feb. 8, 1904, but were rejected by the local officers in a letter to one, L. T. Barin, March 4, 1904, for conflict with certain homestead and timber and stone applications for part of the same lands, These Forest Lieu Selections were filed by Barin in the name of Edward B. Perrin, and Aztec Land and Cattle Co. but the said A. D. Daniels was the beneficial owner of the scrip, which was filed in his interests to protect his purchase from the state under its aforesaid Invalid Indemnity Selections.

On appeal, your office affirmed the action of the

Register and Receiver, giving as further reason and justification thereof the fact, that the Lieu Selections were presented at the local land office prior to cancellation of said Indemnity School Selections, and even prior to the filing of the state's relinquishment. Upon appeal, however, from this action of your office, the Department, Oct. 25, 1905, reversed your office decision, stating while the appeal was pending an affidavit had been filed by A. D. Daniels in which he stated that he was the real party in interest and the equitable owner of the lands assigned as bases for the Lieu Selections; that after its selections of the lands as School Indemnity, the State of Oregon had sold them to sundry purchasers, who paid part of the purchase price and assigned the certificates of sale to him, and he was then the owner thereof; that he thereafter became doubtful as to the validity of the State selection, and in order to protect his interests obtained relinquishments from the State and caused them to be filed in the Local Land Office at Lakeview with Lieu Selections; that in so doing he relied upon your office report of Oct. 13, 1904, (1903) to the Secretary of the Interior; which report was transmitted by the Department to the Governor of Oregon Oct. 17, 1904 (1903).

Considering the appeal, the Department held that the case, was controlled by its decision in the California and Oregon Land Company, (33 L. D. 595), that this case was in all essential respects the same as that one, and remanded the case with directions to adjudicate it thereunder. The Lieu Selections having

been returned to the Register and Receiver for allowance in accordance with said decisions, they were again, on Dec. 6, 1905, rejected by the local officers, for the reason that the lands had been withdrawn by telegram of June 25, 1904, for the Klamath River project. This action of the Register and Receiver was reversed by your officer Jan. 23, 1906, and the selections were remanded to be entered of record as of date Feb. 8, 1904, the day on which they were originally presented, if no other objection appeared. Under dates of March 5, and June 11, 1906, the Register submitted full reports to your office upon the said applications; and stated there were objections to the allowance of the same, in that there were various homesteads and timber and stone applications which had been allowed subsequently to the cancellation of the state's list. The Register also referred to the fact that Daniels had caused a contest to be instituted against the State's selection, and questioned his good faith in the matter.

Separate appeals were taken by the Aztec Land and Cattle Company and Perrin from this action of the local officers, and the papers in connection with the application of the Aztec Company were transmitted to the Department by your office, letter of May 9, 1906, for further consideration in connection with the report of the local office.

Upon sonsideration of the matter thus presented, the Department held in its decision of June 26, 1906, that the facts failed to show that Daniels, was entitled to protection as a Bona Fide purchaser from the

state; that the State's selections were filed Jan. 28, 1902, while the lands were sold on Jan. 21st, preceding, at which they were public lands of the United States, and no one purchasing them could claim to be a Bona Fide purchaser from the State; that as late as Oct. 5, 1903, Daniels was not asserting that he was a purchaser in good faith from the State, but was acting adversely to it and attempting to contest the lists under which he later asked for recognition as a Bona Fide purchaser and for equitable relief; that this position then was inconsistent with the position later assumed: and if had since acquired assignments of the State's certificates of sale, he had done so with full knowledge of the invalidity of the State's claim; that the facts set forth above were fatal to his contention that he was a Bona Fide purchaser, and as such should be permitted to file the State's relinquishment and obtain precedence over others seeking to appropriate the lands under the General land laws; that to conceed to him this privilege under letters Oct. 17 & 13, 1903, mentioned above, would in effect, be to make such persons as from time to time might constitute the State Land Board, agents to dispose of the public lands of the United States, within the State, to such persons as they might favor by means of sales of public land as state land, the subsequent filing of the State's list invalid for want of sufficient base; the filing of the State's relinquishment, and the protection of the purchaser from the state by grace of the Land Department. The Department accordingly held in that decision that the lieu selection should be rejected.

A motion for review of said decision of June 26th, 1906, having been filed by Daniels, Department, on May 15 and 18, 1907, rendered decisions holding that while Daniels, was not, strictly speaking a Bona Fide purchaser from the State, because the Certificates of sale issued by the State antedated the filing of the School Indemnity Selections, and therefore were made at a time when there was no actual claim of the State pending, still Daniels had not purchased the land until the month of April, 1902, nearly three months after the lands had been actually selected by the State, and that having paid a valuable consideration for the lands in an honest belief that a title was being obtained, that was sufficient to constitute a Bona Fide Purchase.

The decision of June 26th, 1906, was therefore recalled, and it was ordered that the Lieu Selection should be reinstated.

In promulgating the decision last mentioned, your office returned the Lieu Selections to the Local Land Office for allowance, and instructed the Register and Receiver to notify all parties who had made entry of said lands subsequently to the cancellation of the State's list to show cause within sixty days why their entries should not be cancelled, because of conflict with said Lieu Selections as a result of which a petition termed, a motion for re-review of Departmental decisions of May 15, and 18, 1907, was filed on behalf of Archie. Johnson who claimed a part of the Lands under a sale made thereof under the Public Land Laws.

This petition or motion charged, in effect, that a conspiracy had been formed for the purpose of acquiring the lands originally by means of the State's selection involved: that the entire proceeding by which title was sought to be acquired was fraudulent, and that the parties thereto should not be allowed to perfect title to the lands, to the injury of those who in good faith had entered the same under the public land laws.

Considering this petition, the Department stated in its decision of August 10th, 1907, that its previous decisions had been ex parte, and that the last decision favorable to Daniels did not prevent your office ordering a hearing, or taking other action with respect to the disposition of the claims of others which might be materially affected by the re-instatement of the claim of Daniels; and the case was accordingly remanded to your office for further consideration, to the end that a full and thorough investigation might be made into the matter, and your office was expressly advised that the previous decisions of the Land Department should in no wise embarass your action in the premises.

A hearing was accordingly ordered; and after due notice to all parties concerned, that the same was had before the local land office, May 25, 1908, Daniels appearing in person and by attorney, and the other parties claiming an interest either in person or by an attorney. The Local Land Office found that the case was not similar in all respects to that of the California and Oregon Land Company cited above; that in

that case there were no intervening rights or equities of other parties, while in the case under consideration the lands had been entered by bona fide settlers or purchasers, to many of whom final certificates had issued and in some instances even Patents had been issued.

The Register and Receiver accordingly recommended that the Homestead and Timber and Stone Entries of the various parties in the case should be allowed to remain in tact. Daniels appealed to your office, whereby your said decision of April 13, 1909, the action of the Local Office was reversed, and it was held that the Lieu Selections should remain in tact.

An appeal on behalf of the Homestead and Timber and Stone claimants brings the case before the Department. Most of the applicants to purchase the lands from the State upon whose supposed initiative these selections were made were not persons in being, but were fictitious persons, usually designated as "Dummies."

But while this is so, there is no evidence in this record showing or tending to show, that Daniels, or any person in privity with him, in fact, was a party to or had any knowledge of the intended fraud; and every material fact in this record supports the conclusion that Daniels bought in good faith, the Certificates of sale issued by the State. He had never heard of these State's Selections until one McHale, a timber land speculator of whom he had no personal acquaintance, but who was known to him by reputation, had reported to him that there was a large body of timber

land for sale, at Klamath, Oregon; and upon McHale's representations, he constituted McHale his agent under powers which amounted to, co-partnership, and McHale went to Klamath Falls to fully investigate these lands and the title thereto. McHale had instructions from Daniels, among other things, to secure the services of an attorney upon the question of title.

He did so. The attorney after an examination of the certificates of sale, reported that the title was good, and McHale's inquiries into the character of the land being satisfactory the results of his investigations was reported to Daniels and the deal was closed, upon the payment by Daniels of $23,901.10 for the certificates, of sale, and the further payment to the State of the unpaid ballance of the purchase price thereon, amounting to $3,033.74. Daniels had no personal acquaintance with any of the parties to the transactions; and so far as it appears from this record, he had no knowledge, information or belief which should have caused him to question the bona fides, of the people with whom he was dealing, or cause him to suspect that there was irregularity in the transaction. Nor was there anything in his connection with subsequent events, in his efforts to acquire title to these lands which may reasonably be said to go to the good faith of his purchase. It appears that rumors were soon thereafter rife with reference to land frauds in Oregon in connection with its school land grant.

The rumors reached Daniels and he promptly investigated them, finding for the first time that his title was questionable, upon the advice of his attorney, he initiated a contest against the State's selections upon which his title rested, hoping thereby to protect his purchase by acquiring an equitable preference right.

As a result of this contest, the state refunded the money which he had paid it and put in the hands of his attorney a relinquishment to the United States of all rights under its selections. Daniels then caused said relinquishments to be filed in the District Land Office, together with the Lieu Selections. There was certainly nothing reprehensible in this proceeding. Moreover, it was taken upon certain suggestions made in your said report of October 13, 1903. This report was responsive to a letter from the Governor of Oregon, September 28, 1903, wherein the inquiry was made of this department as to the means of protecting bona fide purchasers of the school indemnity lands from the State in instances where the State's selections had been cancelled for invalid base. Your offices reported among other things, and this is the same report transmitted to the Governor of Oregon, Oct. 13, 1903, that as to such selections—

while the selection is of record and uncancelled, the land is segregated thereby, and no right can be acquired by the presentation of an applicaiton therefor (29 L. D. 29), but the purchaser holding the State's relinquishment may present it with his application and thereby secure right of entry.

This is also the plain holding of this Department in the
in California and Oregon Land Company, supra, and is precisely the course pursued by Daniels in this case. His contest against the State's selection was to that end. He secured the State's relinquishments and presented them with the aforesaid applications to scrip the land.

It is true the record shows that the relinquishments were not marked, filed, in the local office until Feb. 10, 1904, which was two days after the presentation of the scrip applications.

It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been receved on February 8, instead of February 10, the filing would have been noted on the day they were received.

But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the State's relinquishments were, in fact, filed simultaneously.

The filing was by mail, and the letter of transmittal was written by Daniel's attorney, the said L. T. Barrin.

The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the action of the local officers at the time in rejecting the proffered

scrip applications, is put upon the ground that part of the lands were covered by pending homestead and timber and stone applications, whereas if the State had not then relinquished its school indemnity selections, the local officers would surely have assigned this as the reason for rejection of said applications, because this reason would have applied to all of the lands involved, instead of only a small portion of them, as was the case with the reason assigned.

It is worthy of too, that there has not been found any correspondence or record which would indicate that if the said Barin, had left these relinquishments out of his letter by inadvertence, they were ever afterwards transmitted to the local land office, and no correspondence or record of correspondence showing that if he had been guilty of such inadvertence he was ever advised thereof by the local officers.

I conclude therefore, on this branch of the case that the relinquishments in question and the scrip applications were filed at the same time, as was suggested they might be, in your office report of September 28th, 1903, above quoted.

Under existing regulations, it was the duty of the Register and Receiver to forward these applications, and these relinquishments without action for the consideration and disposition of your office. This however, it has been seen, was not done.

The scrip applications were rejected, and the history of the case, hereinbefore set out, shows that these applications were kept alive by successive appeals,

and that the case was twice remanded to the local officers, with directions to allow the applications, but various reasons were assigned for the neglect or failure of the local officers to obey these instructions.

It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the Secretary had been carried out, it would have been done before the case became complicated by the counter-equitable considerations arising upon the unfortunate allowance of the Homestead and Timber and Stone entries for most of these lands. It is thought however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the Department would not be justified in cancelling such entries and filing, for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition.

See Hoyt vs. Weyerhauser et al). (161 F. E. D., Rep., 324).

It appears however, from your office reports of Dec. 16, 1909, that there are approximately 107 quarter Sections of land involved in this case. Of these, twenty-eight are involved in homestead entries, four

in cash entries and homestead entries, twenty-four in cash entries, twenty-five in Timber and Stone sworn statements, twelve are free and unappropriated, eight of them do not appear to be covered by the Lieu Selections in question, and seven of them have been patented.

In view of what has been said, the claim of Daniels must be denied as to all of them except those covered by Timber and Stone sworn statements only, and those that are unappropriated, amounting to what seems to be, from your office reports, approximately thirty-seven quarter sections in all.

As to these lands, the Timber and Stone applicants have not put themselves in privity with the United States, and the Land Department has not entered in to such Contract with them as to preclude other disposition of the lands.

See Campbell vs. Weyerhauser et al (161 Fed. Rep., 332).

This being true, and believing that the equities of Daniels should be protected to the fullest extent consistent with equitable administration, I have to direct that the Scrip applications be allowed as to all tracts which have not been otherwise disposed of, and rejected as to such as now appear to be covered by Homestead and cash entries.

The decision appeal from is modified. The papers are herewith returned.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

Enclosures.

[Endorsed]: Amended Bill in Equity. Filed May 17, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 9 day of June, 1912, there was duly filed in said Court, a Demurrer, in words and figures as follows, to wit:

[Demurrer to Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

ALFRED D. DANIELS,
Plaintiff,

vs.

RALPH E. BUTLER and D. W. DINEEN,
Defendants.

Demurrer to Amended Bill in Equity.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF OREGON:

Comes now the defendant D. W. Dineen and demurs to the amended bill of complaint of Alfred D. Daniels plaintiff herein on the following grounds:

I.

That the plaintiff has not by his said amended bill made such a case as entitles him in a Court of Equity to any discovery from the defendant or any relief against him as to the matters contained in the said amended bill or any of such matters.

II.

That this Court has no jurisdiction of this cause for

the reason that as disclosed by the amended bill of complaint the plaintiff never acquired any vested interest in the lands described in the said amended bill of complaint and, not having any equitable interest therein, is not entitled to maintain this suit.

III.

That this Court is without jurisdiction in this cause because the land set forth in the amended bill of complaint was entered by the defendant D. W. Dineen's grantor at a time when it was surveyed, un-appropriated and vacant public land and his right to enter the same was passed upon by the General Land Office of the United States and his entry was to be legal and proper and patent to the said land was thereupon issued to him. That the said determination by the General Land Office of the United States was a determination of a question of fact and cannot be reviewed by this Court.

Wherefore and for divers other good causes of demurrer appearing in the said amended bill, defendant demurs thereto and demands the judgment and decree of this Honorable Court whether he shall be compelled to make any other or further answer to the said amended bill and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

ANGELL & FISHER,
Solicitors for Defendant.
D. W. Deneen.

UNITED STATES OF AMERICA,
District of Oregon—ss.

I, Homer D. Angell, being first duly sworn, depose and say that I am one of solicitors and of counsel for defendant D. W. Dineen herein and I certify that, in my opinion, the aforesaid demurrer is well founded in point of law.

[Seal.] HOMER D. ANGELL,

Subscribed and sworn to before me this 31 day of May, A. D., 1912.

FORREST S. FISHER,
Notary Public for Oregon.

STATE OF CALIFORNIA,
County of Sonoma—ss.

I, D. W. Dineen, being first duly sworn, depose and say that I am one of the defendants herein and that the aforesaid demurrer is not interposed for delay.

D. W. DINEEN.

Subscribed and sworn to before me this 27 day of May, A. D., 1912.

[Seal.] EMMA HERMANN,
Notary Public.

Residing at Cloverdale, California.

[Endorsed]: Demurrer to Amended Bill in Equity. Filed Jun. 9, 1912.

A. M. CANNON,
....Clerk U. S. District Court.

And afterwards, to wit, on Saturday, the 3 day of August, 1912, the same being the 29 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

In the District Court of the United States for the District of Oregon.

ALFRED D. DANIELS,

Plaintiff,

vs.

RALPH E. BUTLER and D. W. DINEEN,

Defendants.

This cause having come on regularly to be heard by the Court upon the demurrer of the defendants to the amended bill of complaint of the above named plaintiff, and the defendants having appeared by their attorneys, Angell & Fisher, and the plaintiff having appeared by his attorneys, Messrs. Platt & Platt and Hugh Montgomery, and the Court having heard the arguments of counsel for the respective parties hereto, and having taken the said cause under advisement, and fully considered the same, and being now fully advised in the premises, and it appearing to the Court that said demurrer is well taken and should be in all respects sustained, and that said amended bill of complaint is without equity, and should be dismissed,

IT IS THEREFORE ORDERED, CONSIDERED, ADJUDGED AND DECREED by the Court that the said demurrer to said amended bill of complaint be, and the same is hereby, in and respects sustained, and that said amended bill of complaint be, and the same is hereby dismissed, and that said defendants have and recover of and from said plaintiff their costs and disbursements herein, taxed at $.....

Dated this 3rd day of August, 1912.

R. S. BEAN,

Judge.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Petition for Appeal, in words and figures as folows, to wit:

[Petition for Appeal.]

In the District Court of the United States for the District of Oregon.

ALFRED D. DANIELS,

Plaintiff,

vs.

RALPH E. BUTLER and D. W. DINEEN,

Defendants.

The above named plaintiff, conceiving himself aggrieved by the order and decree made and entered in the above entitled cause on the 3rd day of August, 1912, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings and all things concerning the same, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon his filing a bond for the payment of all damages and costs if he fails to prosecute the said appeal to effect which bond shall act as a supersedeas bond.

ALFRED D. DANIELS,

By Platt & Platt and Hugh Montgomery, Solicitors for Plaintiff.

Hugh Montgomery,

of Counsel.

[Endorsed]: Petition for Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

An dafterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

In the District Court of the United States, for the District of Oregon.

ALFRED D. DANIELS,

Plaintiff,

vs.

RALPH E. BUTLER and D. W. DINEEN,

Defendants.

Assignment of Errors on Appeal.

Now on this 29th day of August, 1912, comes the above named plaintiff, Alfred D. Daniels, appearing by Messrs. Platt & Platt, and Hugh Montgomery, his solicitors of record, and says that in the record and proceedings of the above entitled Court, in the above entitled cause, and in the final order and decree entered therein on the 3rd day of August, 1912, there is manifest error, and that said order and decree is erroneous and against the rights of said plaintiff, and for error the said plaintiff assigns the following:

I.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the de-

murrer, the plaintiff, on the 8th day of April, 1904, made a valid forest lieu selection of the lands described in paragraph V of plaintiff's amended bill filed in said cause under and in accordance with the provisions of the Act of Congress of June 4th, 1897, set forth in paragraph VI of plaintiff's amended bill of complaint.

II.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that by the admissions of the demurrer, the forest lieu selection of the plaintiff, made upon the lands described in paragraph V of his amended bill of complaint, was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly the defendants.

III.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the attempted timber and stone entry of the defendant, Ralph E. Butler,was subsequent in time and inferior in right to the forest lieu selection of the plaintiff.

IV.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the forest lieu selections of the plaintiff had been approved by the proper officers of the United States government, which approval gave the plaintiff a

vested interest in the land so selected.

V.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the alleged homestead entry of the defendant Ralph E. Butler, was made in contravention of the vested rights of the plaintiff herein.

VI.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the plaintiff was equitably entitled to be protected in the forest lieu selections which he had made on the lands described in paragraph V of his amended bill of complaint as against the claims of the defendants or any person or persons whomsoever.

VII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the plaintiff was equitably entitled to have the defendants declared trustees for the plaintiff of the lands described in paragraph V of his amended bill of complaint.

VIII

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that the bill of complaint stated a good cause of action to which the defendant should be required to file her answer or plea.

IX.

Because the above entitled court erred in sutaining the demurrer to plaintif's amended bill of complaint and decreeing that said amended bill of complaint be dismissed and allowing costs to the defendant.

X.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the defendant Ralph E. Butler, prior to the issuance of patent as alleged in paragraph XX of plaintinff's amended complaint, and without any consideration whatsoever therefor, and with full knowledge of the rights and equities of the plaintiff herein, attempted to sell, transfer, and convey all his right, title, and interest acquired under and by virtue of his said entry prior to the issuance of patent, to one John B. Mason, and said John B. Mason received the said pretended conveyance with like knowledge of the rights and equities of plaintiff herein, and said John B. Mason, without any consideration whatsoever moving to him, attempted to sell and transfer all his right, title, and interest to the defendant D. W. Dineen, which said pretended attempted conveyance was received by said D. W. Dineen with full knowledge of the rights and equities of the plaintiff herein.

WHEREFORE, the plaintiff and appellant prays that the decree of said court be reversed and such directions be given that full force and efficacy may enure to the plaintiff by reason of the cause of suit set up in his amended bill of complaint filed in said cause, and that

a decree be entered in accordance with the prayer of plaintiff's amended bill of complaint.

PLATT & PLATT & HUGH MONTGOMERY,
Solicitors for Plaintiff.

HUGH MONTGOMERY,
Of Counsel.

[Endorsed]: Assignment of Errors. Filed August 29, 1912. A. M. Cannon, Clerk U. S. Dist. Court.

And afterwards, to wit, on Thursday, the 29 day of August, 1912, the same being the 51 Judicial day of the regular July 1912 Term of said Court; present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Allowing Appeal.]

In the District Court of the United States for the District of Oregon.

ALFRED D. DANIELS,
Plaintiff,

vs.

RALPH E. BUTLER and D. W. DINEEN,
Defendants.

This day came Alfred D. Daniels, plaintiff, appearing by Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record, and presented his petition for an appeal and an assignment of errors accompanying the same which petition, upon consideration of the court, is hereby allowed, and the court allows an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon the filing of a bond in the sum

of $500 with good and sufficient surety to be approved by the court; and

It is further ordered that said bond shall act as a supersedeas bond; and

It is further ordered that a certified transcript of the record, and all proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

R. S. BEAN,
Judge.

Dated this 29th day of August, 1912.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Bond on Appeal in words and figures as follows, to wit:

[Bond on Appeal.]

In the District Court of the United States, for the District of Oregon.

ALFRED D. DANIELS,
Plaintiff,

vs.

RALPH E. BUTLER and D. W. DINEEN,
Defendants.

KNOW ALL MEN BY THESE PRESENTS: That we, Alfred D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, a corporation, surety, are held and firmly bound unto Ralph E. Butler and D. W. Dineen, in the full and just sum of five hundred ($500) dollars, to be paid to the said Ralph E. Butler and D. W. Dineen, their executors, to which payment, well and truly to be made, we bind ourselves our heirs, executors,

administrators, successors and assigns, jointly and severally, by these presents;

Sealed with our seals this 29th day of August, A. D. 1912.

WHEREAS, lately at the District Court of the United States for the District of Oregon, in a suit pending in said court between A. D. Daniels, plaintiff, and Ralph E. Butler, and D. W. Dineen, defendants, a decree was rendered against said plaintiff, Alfred D. Daniels, and said A. D. Daniels having petitioned an appeal and filed a copy thereof in the clerk's office in said court to reverse the same in the aforesaid suit, and a citation directed to the said Ralph E. Butler and D. W. Dineen, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be holden in the city of San Francisco, in said Circuit, on the 28th day of September, A. D. 1912, having been served on said defendants;

NOW the condition of this obligation is such that, if the said Alfred D. Daniels shall prosecute his appeal to effect, and answer all damages and costs, if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

ALFRED D. DANIELS,
By Platt & Platt,
His Solicitors of Record.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By W. J. Clemen,
Agent.

[Seal] By Harrison G. Platt,
Attorney in Fact.

Examined and approved this 29th day of August, 1912.

R. S. BEAN,
District Judge.

[Endorsed]: Bond on Appeal. Filed August 29, 1912. A. M. Cannon, Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of August, 1912, there was duly filed in said Court, a Citation on Appeal in words and figures as follows, to wit:

[Citation on Appeal.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

ALFRED D. DANIELS,

Appellant,

vs.

RALPH E. BUTLER and D. W. DINEEN,

Appellees.

United States of America,
Ninth Judicial Circuit.—ss.

To Ralph E. Butler and D. W. Dineen, Greeting:

WHEREAS, Alfred D. Daniels, appellant in the above entitled suit has lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in the District Court of the United States for the District of Oregon, made in favor of you, the said Ralph E. Butler and D. W. Dineen, and has filed the security required by law;

you are, therefore, hereby cited to appear before the said United States Circuit Court of Appeals at the city of San Francisco, state of California, on the 28th day of September, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the city of Portland in the Ninth Judicial Circuit this 29th day of August, in the year of our Lord, one thousand nine hundred and twelve.

R.S. BEAN,

Judge of the District Court of the United States for the District of Oregon.

United States of America,
District of Oregon.—ss.

Due service of the within Citation to Appellees, by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 30 day of August, 1912.

ANGELL & FISHER,
Of Attorneys for Appellees.

[Endorsed]: Citation on Appeal. Filed Aug. 30, 1912. A. M. Cannon, Clerk U. S. Dist. Court.

And afterwards, to wit, on Saturday, the 28 day of September, 1912, the same being the 77 Judicial day of the Regular July, 1912 Term of said Court; Present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

In the District Court of the United States for the District of Oregon.

No. 3550.

A. D. DANIELS,

Plaintiff,

vs.

RALPH E. BUTLER, et al.

September 28, 1912.

Now, at this day, for good cause shown, It is Ordered that the plaintiff's time for filing and docketing the record on appeal in this cause in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, enlarged and extended ninety (90) days from this date.

R. S. BEAN,
Judge.

No. 2213

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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fred X. D. DANIELS,

Appellant,

vs.

RALPH E. BUTLER and D. W. DINEEN,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Oregon

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STATEMENT OF THE CASE.

On and prior to the 12th day of April, 1902, one Edward B. Perrin and the Aztec Land and Cattle Company, Ltd., a corporation, were each the owners in fee simple, free of any liens or incumbrances, of certain real property located in the Territory of Arizona, and continued to be such owners up

until the 2d day of February, 1904. On the 12th day of April, 1902, these lands were included within the limits of the San Francisco Mountains Forest Reserves, pursuant to a proclamation issued by the President of the United States. Subsequently and on the 2d day of February, 1904, these parties, acting under and in accordance with the provisions of the Act of Congress passed the 4th day of June, 1897, which Act provided amongst other things that the owners of lands embraced within the limits of a forest reservation might deed back their interests to the United States and select in lieu thereof any unoccupied public land, relinquished and conveyed to the United States their interest in the Arizona land referred to, recorded said deed at the proper office in the county where the land was situated, and on the 8th day of February, 1904, made lieu selections of certain lands situated in the County of Klamath, State of Oregon, which lieu selections were made for the benefit of the appellant in this case. The selections were perfected by presenting the recorded deed, together with a full, true and correct abstract of title showing that the selectors were the owners in fee simple of the lands relinquished, immediately prior to the time the deed to the United States was recorded, as required under the rules issued by the Secretary of the Interior of the United States.

Prior to the time that these selections were made and on or about the 28th day of June, 1902,

the State of Oregon had filed upon the property so selected certain instruments purporting to be school indemnity lists, and before the approval of these lists, had sold the land to the appellant in this case. It afterwards developed that the selections so made by the State of Oregon were rejected upon the ground that the base land which the State had tendered in exchange for the land embraced in its school indemnity lists was not proper base land. The appellant in this case had purchased these lands from the State of Oregon in good faith, but found that the State had given him nothing in exchange for the consideration which he paid. For the purpose of protecting his interests thus acquired, the forest lieu selections already referred to, were made.

At the time of making these selections the lieu selectors presented and filed together with their lieu selections, relinquishments from the State of Oregon of any rights which it might have acquired by virtue of the school indemnity lists filed as above stated. The Secretary of the Interior had held that the filing of school indemnity lists, regardless of their validity, segregated the lands filed upon from the public domain, and therefore these relinquishments were presented in order to relieve the lands in question from the effect of such segregation.

After the making of these lieu selections and the filing of these relinquishments, the officers of

the United States Land Office, located at Lakeview, Oregon, allowed other entries to be made upon the lands so selected, which entries were in direct conflict with the forest lieu selections so made as above stated. This conflict resulted in several successive appeals to the Interior Department of the United States, which appeals extended over a period of about six years. During the continuance of these appeals and on the 25th day of October, 1905, the Secretary of the Interior directed that the forest lieu selections so made as above stated be allowed as of the date on which they were filed, to-wit: February 8, 1904. This the local officers at Lakeview, Oregon, refused to do on the ground that the lands had been withdrawn for what was known as the Klamath River Project. As a result of this refusal the matter again came before the Secretary of the Interior and on June 26, 1906, he again ordered and directed that the said lieu selections be reinstated. After the making of the order last referred to a petition for a review of the entire proceedings was filed on behalf of an individual by the name of Archie Johnson, a speculator who was trying to procure these lands, which petition was allowed. A rehearing of all the facts took place before the Register and Receiver of the local land office at Lakeview, Oregon, which officers recommended that the forest lieu selections be disallowed and the other entries reinstated. This recommendation of the local officers was refused

by the General Land Office on the 13th day of April, 1909, at which time the Commissioner of the General Land Office directed that the forest lieu selections referred to be allowed to remain intact. This last named ruling was taken before the Secretary of the Interior, and on the 17th day of February, 1910, the Secretary of the Interior held that although the forest lieu selections referred to were in all respects regular and should have been allowed when presented, still it was within the competency of the officers of the United States Land Department to dispose of the lands to whomsoever they might choose and that having done so the entries which were in conflict with these forest lieu selections would be allowed and the rights of the lieu selectors, and the appellant in this case, would be denied in all instances where such conflict had occurred.

The appellant having exhausted all the remedies which were available to him in the proceedings before the Land Department waited until a patent to the lands involved was issued to the appellee Ralpn E. Butler, and then instituted the present suit to have the appellees declared Trustees of said lands for the appellant, invoking the well known and well established principle that where the officers of the general government through the application of an erroneous principle of law or a wrong interpretation of a statute, confirm title to public lands to one entryman in an instance where another entryman

is lawfully entitled thereto, courts of equity will intervene and declare the party to whom title has been wrongfully confirmed a Trustee for the party to whom the land rightfully belongs.

On the 29th day of September, 1909, the appellant filed in the District Court of the United States for the District of Oregon, a bill of complaint setting forth the facts substantially as above stated, to which bill of complaint the court sustained a demurrer interposed by the appellees.

Subsequently and on or about the 17th day of May, 1912, the appellant filed an amended bill of complaint, to which amended bill of complaint the court again sustained a demurrer interposed by the appellees upon the ground that the amended bill of complaint failed to state facts sufficient to constitute a cause of suit. A decree was entered dismissing the case and from this decree an appeal has been perfected.

Prior to the issuance of patent in this case, the appellee, Ralph E. Butler, attempted to convey all his right, title and interest to a third party, which third party attempted to convey the same to the appellee, D. W. Dineen. Appellant's amended bill of complaint alleges, however, that this conveyance was made for the purpose of defrauding the appellant, and that the appellee, D. W. Dineen, received said conveyance with full knowledge of all the proceedings which had taken place before the Interior Department involving the title to the lands

covered by appellant's lieu selection, and of the appellant's equities in said lands. The demurrer of the appellee, D. W. Dineen, admits the allegations with reference to this attempted fraudulent transfer, and it will, therefore, be needless for us to further discuss the question, because under these admissions the rights of the appellee, D. W. Dineen, can not be placed on any higher or better basis than the rights of the appellee, Ralph E. Butler. In other words, the doctrine of innocent purchaser is eliminated by virtue of the admissions of the demurrer.

SPECIFICATION OF ERRORS.

The errors relied upon by the appellant are as follows:

First. The trial court erred in not holding that by the admissions of the demurrer filed by the appellees to the appellant's amended bill of complaint the appellant did on the 8th day of February, 1904, make a valid forest lieu selection of the lands embraced in Paragraph 5 of his amended bill of complaint, and that said forest lieu selection so made was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever and particularly the appellees, and in not holding that by the admissions of the demurrer the attempted timber and stone entry of the appellee, Ralph E. Butler, was subsequent in time and inferior in right to the forest lieu selection of the appellant.

Second. The trial court erred in sustaining the demurrer to appellant's amended bill of complaint, in that it did not hold that by the admissions of the demurrer the forest lieu selection of the appellant had been approved by the proper officers of the United States Governemnt, which approval gave the appellant a vested interest in the land so selected as against the claim or claims of all persons whomsoever and particularly the appellees.

Third. The trial court erred in not holding that by the admissions of the appellees' demurrer the alleged timber and stone entry of the appellee, Ralph E. Butler, was made in contravention of the vested rights of the appellant, and because the trial court erred in sustaining the demurrer to the appellant's amended bill of complaint in that it did not hold that by the admissions of the demurrer the appellant was equitably entitled to be protected in the forest lieu selection, which he had made upon the lands described in Paragraph 5 of his amended bill of complaint as against the claims of the appellees or any persons whomsoever.

Fourth. The trial court erred in sustaining the demurrer to appellant's amended bill of complaint in that it did not hold that by the admissions of the demurrer the appellant was equitably entitled to have the appellees declared Trustees for the appellant of the lands described in Paragraph 5 of his amended bill of complaint.

Fifth. The trial court erred in sustaining the demurrer to the appellant's amended bill of complaint in that it did not hold that said amended bill of complaint stated a good cause of suit to which the appellees should be required to file their answer or plea, and in decreeing that appellant's amended bill of complaint be dismissed and in allowing costs to the appellees.

Sixth. The trial court erred in not holding that by a proper construction of the Act of Congress of June 4, 1897, the appellant was entitled to have his forest lieu selection of the lands embraced in Paragraph 5 of his amended bill of complaint sustained as against the entry of the appellee Ralph E. Butler and that by a proper construction of said Act the appellees should be declared Trustees for the appellant of the lands described in Paragraph 5 of appellant's amended bill of complaint, which lands were patented to the appellee Ralph E. Butler, all of which matters and things constitute and present a Federal question.

Seventh. The trial court erred in that it did not hold that by the admissions of the demurrer filed by the appellees to the appellant's amended bill of complaint the defendant, Ralph E. Butler, prior to the issuance of patent as alleged in Paragraph 20 of appellant's amended bill of complaint, attempted to convey to John B. Mason all of his right, title and interest acquired under and by virtue of his said entry, that said conveyance was without any

consideration whatsoever, and that the said John B. Mason received the same with the full knowledge of the rights and equities of the appellant, and that the said John B. Mason, without any consideration whatsoever moving to him attempted to sell and transfer all of his right and interest to the appellee, D. W. Dineen, which said pretended attempted conveyance was received by the said D. W. Dineen with full knowledge of the rights and equities of the appellant herein.

POINTS AND AUTHORITIES.

I.

Whenever lands are embraced within a forest reservation pursuant to a proclamation of the President of the United States, the owners of such land might prior to March 3, 1905, select in lieu thereof any vacant unoccupied public land of the United States.

Act of June 4, 1897, 30 Stat. at L. 36; U. S. Comp. Stat. 1901, p. 1541.

II.

Courts of equity have power to grant relief to an individual aggrieved by the erroneous decision of a legal question by the department officers.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 109; 47 Law. Ed. 91, 96.

III.

If a patent to land to which one is entitled has been improperly issued by the United States to another, the courts will quiet the title of the former or adjuge the other a Trustee of the title for him.

Loney v. Scott, 112 Pac. 172, 175 (Ore. 1910).

Morrow v. Warner Valley Stock Co., 101 Pac. 171, 185 (Ore. 1909).

Lee v. Johnson, 116 U. S. 48, 49; 29 Law. Ed. 570.

Kerns v. Lee, 142 Fed. 985, 988 (C. C. D. Ore. 1906).

Stark v. Starrs, 6 Wall. 402, 419; 18 L. Ed. 925, 930.

Silver v. Ladd, 7 Wall. 219, 228; 19 L. Ed. 139, 141.

Shepley v. Cowan, 91 U. S. 330, 340; 23 L. Ed. 424, 428.

IV.

The filing of a lieu selection segregates the land upon which the filing is made from the public domain and cuts off all intervening and subsequent rights as against the lieu selector.

Weyerhauser v. Hoyt, 219 U. S. 380, 388; 55 L. Ed. 258, 261.

Santa Fe Pacific R. R. Co., 41 L. D. 96, 98 (June, 1912).

V.

The Act of June 4, 1897, created a standing offer upon the part of the Government to exchange the land within a forest reservation for any unoccupied public land, and this offer once accepted becomes a contract between the Secretary of the Interior and the lieu selector.

Roughton v. Knight, 219 U. S. 544; 55 L. Ed. 326, 327.

VI.

The power of supervision possessed by the officers of the Land Department, to correct or annul entries of land or change their prior rulings or set aside the action of the local land officers is not an unlimited or arbitrary power.

Cornelius v. Kessel, 128 U. S. 456, 461.

Ballinger v. United States ex rel. Frost, 216 U. S. 240, 248; 54 L. Ed. 465, 468.

Peyton v. Desmond, 129 Fed. 1, 9 (C. C. A. Eighth Circuit, 1904).

Howe v. Parker, 190 Fed. 738, 757 (C. C. A. Eighth Circuit, 1911).

VII.

Under the Act of June 4, 1897, a vested interest is created by the filing of a forest lieu selection.

Olive Land and Development Co. v. Olmstead, 103 Fed. 568, 574 (C. C. Cal., 1900).

VIII.

The power of approval being a judicial power, imposes upon the Secretary of the Interior the duty to determine the lawfulness of selections as of the time when the exertion of the authority is invoked by the lawful filing of a selection list.

Weyerhaeuser v. Hoyt, 219 U. S. 380, 387; 55 L. Ed. 258, 261.

IX.

If the case made by the plaintiff is one which depends upon the proper construction of an Act of Congress, with a contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States.

Northern Pacific Railroad Company v. Soderberg, 188 U S. 526, 528; 47 L. Ed. 575, 581.

X.

It is a well established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him.

Lytle v. The State of Arkansas, 9 How. 314, 332.

ARGUMENT.

The amended bill of complaint filed by the appellant in the case at bar proceeded upon the theory that where the public land officers of the United States Government make an application of an erroneous principle of law or adopt an erroneous construction of a statute in determining the rights of claimants to public land, a court of equity will intervene after the issuance of patent and declare the patentee to be the holder of the land in trust for the party to whom the land should be awarded. This principle has been announced by an almost unbroken line of decisions, and was very concisely and accurately stated by the Supreme Court of the United States in the case of Lee v. Johnson, 116 U. S. 48, 49; 29 L. Ed. 570, in which case the following language was employed:

> "If, however, those officers mistake the law applicable to the facts, or misconstrue the statutes, and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. The court in such a case merely directs that to be done which those officers would have done if no error of law had been committed."
>
> Lee v. Johnson, 116 U. S. 48, 49; 29 L. Ed. 570.

The decison of the Secretary of the Interior Department determining the rights of the respective

claimants to the land involved in the case at bar, is attached to and made a part of the appellant's amended bill of complaint and appears on pages 22 to 35 inclusive of appellant's Transcript of Record. This decision after setting forth the facts hereinbefore presented in our statement of this case, proceeded to hold that the forest lieu selections of the appellant were in all respects regular and in accordance with the requirements of the rules governing forest lieu selections, and continued as follows:

"It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the secretary had been carried out it would have been done before the case became complicated by the counter equitable considerations arising upon the unfortunate allowance of the homestead and timber and stone entries for most of these lands. It is thought, however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the department would not be justified in cancelling such entries and filings for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the land department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition."

See Hoyt v. Weyerhaesuer et al. (161 Fed. Rep. 324).

Appellant's Transcript of Record, page 34.

The language thus quoted presents in its own words the error which has deprived appellant of his rightful interests. The very case cited in support of this error was afterwards reversed by the Supreme Court of the United States and its decision in this particular will be referred to later. When the Secretary said "That Daniel's application was in all respects regular and might have been allowed when presented," he directly contradicted the previous findings of the very decision in which this language was used. It appears from this decision that the department directed the allowance of these selections on October 25, 1905. (Appellant's Transcript of Record, pages 24, 25.) The same decision also shows that on June 26, 1906, the department again ordered that the lieu selections be reinstated. (Appellant's Transcript of Record, page 27.) Again it appears from the face of the same decision that the General Land Office directed on April 13, 1907, that said lieu selections remain intact. (Appellant's Transcript of Record, page 29.)

The appellant contends that the power of the Land Department to determine the validity of entries or selections is not an arbitrary or unlimited power, and that in the exercise of such power the department is not permitted to dispose of public lands to whomsoever it wishes, but must follow the directions of the law governing the acquisition of such lands and determine whether or not all required acts in connection with the acquisition there-

of have been performed. The appellant further contends that where the Land Department finds all such necessary acts to have been performed in connection with a selection of public land in lieu of land included within the limits of a forest reservation, as provided by the Act of June 4, 1897, and has once approved such a selection, that the said department can not thereafter disallow such selection in favor of a right which was subsequent in time to the right first initiated.

The Act referred to provides among other things as follows:

"That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reservation the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: Provided further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

Act of June 4, 1897, 30 Stat. at L. 36; Vol. 2, U. S. Comp. Stat. 1901, p. 1541.

Appellant's Transcript of Record, page 4.

The above Act was construed by the Circuit Court of the United States for the Southern District

of California in the case of Olive Land and Development Co. v. Olmstead, 103 Fed. 568, in which case his honor, Judge Ross, held that a mere filing of a forest lieu selection created a vested interest in the lands selected without reference to the approval of any Land Department officer. The language used in this particular was as follows:

> "And, turning to the act under consideration, it is seen, and as has already been observed, that the power to 'select' is by the statute given to the party who is invited to make the exchange, provided always that he confines his selection to the class of lands described in the statute, to-wit: Those vacant and open to settlement. No other condition is imposed by the statute. The act in question differs very materially in this respect from the indemnity clauses of many of the railroad and other grants, requiring the selections to be made by and with the advice, consent, direction or approval of some officer of the land department, in which case such consent or approval is deemed a condition precedent to the vesting of any interest in the selected land."
>
> Olive Land and Development Co. v. Olmstead, 103 Fed. 568, 574 (C. C. Cal., 1900).

The appellant, relying upon the language of this case, argued in the court below that the mere filing of his forest lieu selection created in him a vested interest in the land selected as against all others, without reference to the approval of the Interior Department, and that said department could only disapprove his selection for failure to comply with the requirements of the statute, such as his inability

to show good title to the land relinquished, or to establish that the land selected was public, unoccupied, non-mineral land, free and open to entry. The trial court, however, held that the case of Olive Land and Development Co. v. Olmstead was now of no force and effect for the reason that Judge Ross in the case of Cosmos Exploration Company v. Gray Eagle Oil Company, 104 Fed. 20, 34, had explained that the case of Olive Land and Development Co. v. Olmstead, 103 Fed. 568, had been decided without reference to the rules of the Land Department regulating the procedure of applicants for exchange of lands under the Act of June 4, 1897, and for the further reason that the Supreme Court of the United States in the same case of Cosmos Exploration Company v. Gray Eagle Oil Company, 190 U. S. 301, 312; 47 L. Ed. 1064, 1072, had held that the mere filing of papers was not sufficient to create an equitable title and that a decision as to the validity of the filing was necessary.

(See opinion of trial court, pages 23, 24, Appellant's Transcript of Record, in Case of Daniels v. Wagner, No. 2217.)

The Supreme Court of the United States, in the case last referred to, used the following language:

"There must be a decision made somewhere regarding the rights asserted by the selector of land under the act before complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the

statute, and the selector cannot decide the question for himself."

> Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 312; 47 L. Ed. 1064, 1072.

The language last quoted presents nothing which is in conflict with the holding of Judge Ross in the case of Olive Land and Development Co. v. Olmsted, 103 Fed. 568, 574. The holding of Judge Ross was merely to the effect that the filing of a forest lieu selection initiated a vested right and created a vested interest. He did not hold, however, that such a right could be initiated and such an interest created by the mere filing of papers. The case contemplated that the selector must file the proper kind of papers and select the proper kind of land. These questions must, of course, be determined by the officers of the Land Department, and these very questions were determined in favor of the appellant in the case at bar, as shown by the allegations of his amended bill of complaint, which allegations are admitted by the appellee's demurrer. It is not claimed that the mere making of a lieu selection creates a complete equitable title, but it is claimed that the filing of such a selection segregates the land selected from the public domain and initiates a vested right and creates a vested interest which may ripen into a complete equitable title, when it is finally determined that the selection is in all respects regular.

Furthermore, the language quoted from the case of Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301; 47 L. Ed. 1064, 1072, was mere dicta in the case then before the court, and the real question decided was that in the case then under consideration, no decision whatsoever had been made by the Land Department with reference to the validity of the selection there made. The following language establishes this conclusion:

"Concluding, as we do, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished has never been decided by the land department, but is still properly before that department, the courts cannot take jurisdiction and proceed to decide such questions themselves."

> Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 315; 47 L. Ed. 1064, 1073.

What application can the principles of law as applied to the facts before the court in the case last cited have with reference to the facts of the case at bar, wherein it is admitted that the selections of the appellant were in all respects regular, and such facts had been so determined by the Secretary of the Interior? We venture also to assert that no language can be found in the case of Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301; 47 L. Ed. 1064, which in any manner contravenes or contradicts the doctrine announced by Judge Ross in the case of Olive Land and De-

velopment Co. v. Olmstead, 103 Fed. 568, 574, holding that the filing of a forest lieu selection initiates a vested right and creates a vested interest, as against all subsequent entries without regard to the approval of the Land Department.

It has also been many times held that even in instances where the approval is necessary, such power of approval is neither arbitrary nor unlimited and can not be exercised without regard to established principles of law. This very rule was announced by the Circuit Court of Appeals for the Sixth Circuit, speaking through Mr. Justice Van Devanter. The case referred to holds as follows:

"But the power of the land department to review its prior holdings and to cancel existing entries is not unlimited or arbitrary."

(Citing Cornelius v. Kessel, 128 U. S. 456; 32 L. Ed. 482.)

Peyton v. Desmond, 129 Fed. 1, 9 (C. C. A., Eighth Circuit, 1904).

Again:

"Neither the general jurisdiction nor the supervisory power of the commissioner or of the secretary is arbitrary or unlimited. The effective exercise of each is conditioned by established rules of law. The settled rules and practice and the uniform decisions of the department constitute both rules of law and of property, and equitable titles in entrymen cannot be destroyed by the Land Department in violation of them. System, order and the uniform application of the established

rules and practice of the department to all litigants alike are as essential to the administration of justice in the land department as in the courts. What a farce the attempt to secure or protect rights in any judicial or quasi-judicial tribunal must become if its rules and decisions are ignored or applied to each case as it arises at the arbitrary will of the officer who presides. Equitable titles of claimants to lands under the acts of Congress may not be annulled by the land department in violation of its settled practice or of a rule of law and of property established by a long line of decisions of its officers, nor without legal notice to the parties in interest and an opportunity to be heard."

Howe v. Parker, 190 Fed. 738, 757 (C. C. A., Eighth Circuit, 1911).

As already shown by a reference to the decision of the Secretary of the Interior attached to the appellant's amended bill of complaint, he arbitrarily held that regardless of the regularity of the appellant's application and regardless of the unfortunate action of the local land office in allowing subsequent entries to be made, the Land Department would not cancel those entries for the mere purpose of protecting the equities of Daniels. This was one of those special cases referred to in the decision last cited where established rules and decisions were ignored at the arbitrary will of the presiding officer and the admitted equities of the appellant brushed aside by a mere stroke of the pen, and this appellant is here now asking this court whether or not such equitable titles as his can be thus an-

"It is beyond dispute on the face of the granting act of July 2, 1864, C. 217, 13 Stat. at L. 365, 367, and of the joint resolution of May 31, 1870, C. 67, 16 Stat. at L. 578, extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. It is also beyond dispute that, as the only method provided by the granting act for executing the grant in this respect was a selection of the lieu lands by the railroad company, subject to the approval of the Secretary of the Interior, that a construction which would deprive the railroad company of its substantial right to select and would render nugatory the exertion of the power of the Secretary of the Interior to approve lawful selections when made, would destroy the right which it was the purpose of Congress to confer. That the effect of holding that lands lawfully embraced in a list of selections duly filed and awaiting the approval of the Secretary of the Interior could, in the interim, be appropriated at will by others would be destructive of the right of selection is not only theoretically apparent from the mere statement of the proposition, but has, moreover, in actual experience been found to be the practical result of carrying that doctrine into effect. See 25 Opin. Atty. Gen. 632. Considering the language of the granting act from a narrower point of view, a like conclusion is in reason rendered necessary. The right to select within indemnity limits was conferred to replace lands granted in place which were lost to the railroad company because removed from the operation of the grant of lands in place by reason of the existence of the rights of others originating before the definite location of the road. The right to select within indemnity limits excluded lands to which rights of others had attached before the selection, and hence simply required that the selection, when made, should not include lands which at that time were

subject to the rights of others. The requirement of approval by the secretary consequently imposed on that official the duty of determining whether selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending action of the secretary. The scope of the power to approve lists of selections, conferred on the secretary, was clearly pointed out in Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 511, 33 L. Ed. 687, 694, 10 Sup. Ct. Rep. 341, where it was said that the power to approve was judicial in its nature. Possessing that attribute, the authority therefore involved not only the power, but implied the duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections. This view, while it demonstrates the unsoundness of the interpretation of the granting act which the contrary proposition involves, serves also at once to establish that the obvious purpose of Congress in imposing the duty of selecting and submitting the selections when made to the final action of the Secretary of the Interior was to bring into play the elementary principle of relation, repeatedly sanctioned by this court and uniformly applied by the land department from the beginning up to this time, under similar circumstances, in the practical execution of the land laws of the United States. Without attempting to cite the many cases in this court illustrating and applying the doctrine, a few only which are aptly pertinent and here decisive are referred to. Gibson v. Chouteau, 13 Wall. 92, 100, 20 L. Ed. 534, 536; Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 720, 733, 28 L. Ed. 872, 877, 5 Sup. Ct. Rep. 334; Oregon & C. R. Co. v. United States, 189 U. S. 103, 112, 47 L. Ed. 726, 730, 23 Sup. Ct. Rep. 615; United States v. Detroit Lumber Co., 200 U.

S. 321, 334, 50 L. Ed. 499, 504, 26 Sup. Ct. Rep. 282, and cases cited.

"In Shepley v. Cowan there was conflict between a pre-emption claim and a selection on behalf of the State of Missouri under an act of Congress conveying to the state a large quantity of land to be selected by the governor, the act providing that if the selection should be approved by the Secretary of the Interior, patents were to issue. The court said (p. 337):

" 'The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office; and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office.'

"On page 338, after distinguishing Frisbie v. Whitney, 9 Wall. 187, 19 L. Ed. 668, and Yosemite Valley Case (Hutchings v. Low), 15 Wall. 77, 21 L. Ed. 82, the court said:

" 'But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.'

In St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 720, 28 L. Ed. 872, 5 Sup. Ct. Rep. 334, one of

the questions arising for decision was which of two railroad companies was entitled to certain tracts of lieu lands situated within overlapping indemnity limits of certain grants made by an act of Congress to the territory of Minnesota to aid in the construction of the roads of the contesting companies. The selections were to be made by the governor, and required the approval of the Secretary of the Interior. The Winona Company filed a list of selections. The St. Paul Company made no selections, but nevertheless, on grounds which need not be stated, the Secretary of the Interior certified the lands to the state for the use of that company. The Winona Company brought suit in the state court to have a declaration of its rights in the land and to restrain the St. Paul Company and others from receiving a patent or other evidence of title to the lands from the governor of the state. The state court decreed in favor of the Winona Company, and this court affirmed its action. In the course of the opinion it was said (page 731):

"'The time when the right to lands becomes vested, which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant or of lands which, for other reasons, are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limits by the location of the line of the road.'

"After referring to prior decisions the conclusion was reached that, as to the lands to be selected, 'priority of selection secures priority of right;' and that as the Winona Company alone had made selection of the lands, and that selection was lawful, the right to the land as against third parties vested in the Winona Company as of the date of the filing of its lists of selections. In concluding the opinion it was said (page 733):

"'It is no answer to this to say that the Secretary of the Interior certified these lands to the state for the use

of the appellant. It is manifest that he did so under a mistake of the law, namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for lieu lands or for the extended grant of 1864, out of any odd sections within 20 miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the law, and this erroneous decision of his cannot deprive the Winona Company of rights which became vested by its selection of those lands. Johnson v. Towsley, 13 Wall. 72, 80, 20 L. Ed. 485, 486; Gilson v. Chouteau, 13 Wall. 92, 102, 20 L. Ed. 534, 537; Shepley v. Cowan, 91 U. S. 330, 340, 23 L. Ed. 424, 427; Moore v. Robbins, 96 U. S. 530, 536, 24 L. Ed. 848, 851.' So, also, in Oregon & C. R. Co. v. United States, 189 U. S. 103, 47 L. Ed. 726, 23 Sup. Ct. Rep. 615, the court said (page 112):

" 'Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd numbered sections within its place or granted limit—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class the company acquires no interest in any specific sections until a selection is made with the approval of the land department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make.'

"The doctrine thus affirmatively established by this court, as we have said, has been the rule applied by the land department in the practical execution of land grants from the beginning. Porter v. Landrum, 31 Land Dec. 352; Re Southern P. R. Co., 32 Land Dec. 51; Re Santa Fe P. R. Co., 33 Land Dec. 161; Eaton v. Northern P. R. Co., 33 Land Dec. 426; Santa Fe P. R. Co. v. Northern P. R. Co., 37 Land Dec. 669. The well settled rule

of the land department on the subject was thus stated by the then assistant attorney general in the department, now Mr. Justice Van Devanter, as follows:

" 'Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings; and while, until approved and patented, they would remain subject to examination, and to rejection or cancellation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.

" 'There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.

" 'What effect has been given to a pending railroad indemnity selection?

" 'Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal; but on August 15, that year, these withdrawals were revoked and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. Dinwiddie v. Florida R. & Nav. Co., 9 Land Dec. 74. In the circular of September 6, 1887 (6 Land Dec. 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. In fact a railroad

indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws.' (32 Land Dec. 53.)

"Despite the doctrine of this court, as expounded in the cases previously referred to, the unbroken practice of the land department from the beginning in the execution of land grants, impliedly sanctioned by Congress during the many years that administrative construction has prevailed, and the destructive effect upon rights conferred by land grant acts which would result from applying the contrary view, it is yet urged that this must be done because of decisions of this court which it is insisted constrain to that conclusion. One of the decisions thus referred to is Sjoli v. Dreschel, 199 U. S. 564, to which we have previously referred, and others are cited in the margin.

"What we have already said as to the Sjoli case would suffice to dispose of the suggestion concerning that case, but we shall recur to it. As to the other cases, it would be adequate to say that not one of them involved the question here under consideration, nor even by way of obiter was an opinion expressed on such question. Indeed, all the cases relied upon may be placed in one of three classes: (a) those involving the nature and character of the right, if any, to indemnity lands prior to selection; (b) whether such lands, after the filing of a list of selections and before action by the Secretary of the Interior thereon, could be taxed by a state to the railroad company as the owner thereof; and (c) those which were concerned with the nature and character of acts which were adequate to initiate a right to public land which would be paramount to a list of selections when the acts were done before the filing of the list of selections. In none of the cases, moreover, was

the well settled doctrine of this court as to relation, even by remote implication, questioned. Indeed, in most of the cases relied upon the previous decisions to which we have referred, expounding the doctrine of relation, were approvingly cited or expressly reaffirmed.

"The Sjoli case, from the facts we have already stated, is clearly here inapplicable, because it falls in the third of the above classes. If it be conceded that general language was used in the opinion in that case which, when separated from its context and disassociated from the issues which the case involves, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in Cohen v. Virginia, 6 Wheat. 399, 5 L. Ed. 290, so often since reiterated and expounded by this court, to the effect that 'general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.' The wisdom of the rule finds apt illustration here when it is considered that not even an intimation was conveyed in the Sjoli case of any intention to overrule the repeated prior decisions of this court concerning the operation and effect of the doctrine of relation upon the approval by the Secretary of the Interior of a lawful list of selections. That the general expressions in the Sjoli case are not persuasive here clearly results from the demonstration which we have previously made, that to apply them would be in effect to destroy the indemnity provisions of the granting act. Moreover, that serious general injurious consequences would arise from treating the expressions relied upon in the Sjoli case as persuasive is clear (a) because to do so would result in the overthrow of the uniform rule by which the land department has administered land grants from the beginning—a rule continued in force

after the decision in the Sjoli case because of the administrative conclusion that that case should be confined to a like state of facts and not be extended to other and different conditions (25 Ops. Atty. Gen. 632); (b) because of the destructive effect upon rights of property and the infinite confusion which would now arise from extending, under the circumstances stated, the observations in the Sjoli case to the wholly different state of facts presented upon this record."

Weyerhaeuser v. Hoyt, 219 U. S. 380, 387: 55 L. Ed. 258, 261-264.

The opinion just quoted proceeds upon the theory that it appears from the face of the granting act and joint resolution therein referred to, that Congress intended to confer upon the lieu selector a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. That portion of said Act which relates to the right of selection provides as follows:

"And whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior."

13 Stat. at L. 365, 367, 368.

The language of the Act which is now before this court for construction in the present case provides in part as follows:

"That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within

the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government and may select in lieu thereof a tract of vacant land open to settlement."

30 Stat. at L., 36, Chap. 2, U. S. Comp. Stat. 1901, p. 1541.

The only essential difference between these two provisions is that in the case of a railroad selection the statute requires the approval of the Secretary. This brings all suits arising under and in accordance with the provisions of the forest lieu selection act within direct range of the doctrine announced and the principles laid down in the case of Weyerhaeuser v. Hoyt, 219, U. S. 380, above cited. This very contention was supported by the Interior Department itself in the recent case of Santa Fe Pacific Railroad Co., 41 L. D. 96, 98. In said case the First Assistant Secretary held as follows:

"The state relies largely upon the language found in the case of Sjoli v. Dreschel (199 U. S. 564), but without giving extended consideration thereto it is sufficient to say that said decision was explained and distinguished in the more recent case of Weyerhaeuser v. Hoyt (219 U. S. 380), and from the latter decision it may be fairly deduced that a selection requiring departmental approval is from the date of its filing an appropriation of the land selected, and that when approval is given its relation is of the time of its filing."

Santa Fe Pacific Railroad Co., 41 L. D. 96, 98 (June, 1912).

Even, therefore, if the court should read into the statute of June 4, 1897, the requisite of departmental approval as a condition to the vesting of any interest, nevertheless under the decision last cited, the land selected is segregated from the public domain and is therefore not open to entry pending such approval or disapproval, and it is admitted in the case at bar that the entry of the appellee, Ralph E. Butler, was made long before the final decision of the Interior Department arbitrarily overruling its prior holdings and revoking Daniels' rights, and long after the making of Daniels' lieu selection.

As above stated, the case of Weyerhaeuser v. Hoyt proceeds upon the theory that Congress intended to confer upon the Railroad Company a substantial right to select land within the indemnity limits in lieu of lands lost within the place limits. Does the Act of June 4, 1897, which Act is presented for consideration at this time, purport to confer such a substantial right? To hold otherwise would be to render the statute itself meaningless, and would in the language of Chief Justice White in the Weyerhaeuser case above cited not only "destroy the right which it was the purpose of Congress to confer," but would also "be destructive of the right of selection."

In order to combat the clear, lucid and elementary principles laid down in the case of Weyerhaeuser v. Hoyt above cited, and to avoid, if possible, the application of those principles to the

case at bar, it was argued upon the hearing and maintained by the court that the objects, purposes and results contemplated by the Act of June 4, 1897, were entirely different from the objects, purposes and results contemplated by the granting act and joint resolution presented for consideration in the case of Weyerhaeuser v. Hoyt. It was contended and held that the act involved in the latter case amounted to a grant and that the right of selection therein given was in exchange for a vested right of which the railroad had been deprived, while on the other hand the Act of June 4, 1897, was a mere standing offer upon the part of the Government to give to the owner of lands included within the limits of a forest reservation the right to select other land in lieu thereof, the selector not being deprived, however, of any vested right for the reason that he was under no obligation to select land elsewhere and could continue if he so desired to possess his holdings within the forest reservation; and that since the right of selection was in the nature of a contract offer, the Government could accept or reject the offer at its will.

The fallacy of this theory as formulated is shown by its mere enunciation.

In the first place, the distinction which the theory attempts to support is negatived by the very holdings made in the case of Weyerhaeuser v. Hoyt. In that case Justice White, referring to the earlier decision of Oregon & California Railroad Co.

v. United States, 189 U. S. 103, 112; 47 L. Ed. 726, 731, for the purpose of determining the inherent character of a selection made under the Act there presented for consideration, adopted the following quotation:

> "Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd numbered sections within its place or granted limits, which interest relates back to the date of the granting act, the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the land department, and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make."
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> Weyerhaeuser v. Hoyt, 219 U. S. 380, 391; 55 L. Ed. 258, 263.

It is apparent from the language last quoted, that the right of selection conferred upon the Railroad Company was not only not a grant, but that it did not rise even to the dignity of a contractual relation, which according to the contention of the solicitors for the appellee and of the trial court, was conferred by the Act of Congress of June 4, 1897, giving to the owner of lands within a forest reservation the contract right to select any other public land in lieu thereof. The language above quoted holds expressly that up until the date of selection the Railroad Company acquired no interest

whatsoever in the selected land, and so free was such land from any individual interest whatsoever, that prior to a selection the Government could make any disposition of the land which it might see fit. Furthermore, the very language quoted points this out as a basic distinction between lands within indemnity limits and lands within place limits. How, then, can it be logically argued for a single moment that under the acts presented for consideration in the case of Weyerhaeuser v. Hoyt, the Railroad Compay acquired any higher or better rights of selection than the owner of forest reservation land acquires under the Act of June 4, 1897!

Indeed, it is very apparent that Congress has bestowed upon the owner of land within a forest reservation a greater right to the lieu land than was conferred upon the Railroad Company by the act construed in the case of Weyerhaeuser v. Hoyt above cited, because the very contention which the solicitor for the appellee urged in attempting to distinguish the case of Weyerhaeuser v. Hoyt from the present case, admits that from the date of selection a contractual relation is established between such an owner of land within a forest reservation and the United States Government.

Furthermore, the Railroad Company acquired absolutely no interest in lands granted, which had been otherwise reserved, sold or granted prior to the railroad grant, for the reason that these prior sales made it impossible for any title to said por-

tions of the land to vest in the Railroad Company. It therefore follows that the Railroad Company had been deprived of no vested right, while on the contrary the owner of land within a forest reservation had at least been constructively deprived of a vested interest, by virtue of the act which enclosed his land within the limits of a forest reservation.

In the second place, if the contention urged by the appellee and sustained by the court, to the effect that the statute of June 4, 1897, constitutes a standing offer on the part of the Government to give land in exchange for land embraced within a resservation, then it follows that whenever this offer is accepted by virtue of a selection there is immediately created a vested right, of which the selector can not be deprived unless perchance he has failed to conform to some one of the conditions precedent which must accompany his acceptance of the outstanding offer. This latter proposition is supported by a decision of the Supreme Court of the United States in the case of Roughton v. Knight, 219 U. S. 537. Justice Lurton quoting from the Secretary of the Interior, used the following language in the case last referred to:

"No contract arises until a selection is made and the conveyance of the base tract filed in the land department. Under the Act of June 4, 1897, it is the filing of the deed in the local land office and the selection of land in lieu of that relinquished which initiates the ex-

change. Until that time the exchange is not initiated and is merely a purpose in the private owner's mind."

> Roughton v. Knight, 219 U. S. 537, 548; 55 L. Ed. 326, 328.

If, therefore, it be held that the Act of June, 4, 1897, does not in itself constitute a grant of lands without a reservation in lieu of lands included therein, but is on the contrary an open standing offer on the part of the Government constituting a contractual relation, then the moment this offer is accepted a right is initiated, the offer and acceptance are complete, and it only remains for the officer upon whom the duty devolves, to determine whether or not the selection is in all respects regular. It is admitted in the case at bar that a deed to the land within the forest reservation was made and executed. It is further admitted that an abstract of title showing the grantor to be the owner in fee simple of the land so deeded was presented, together with the deed. It is further admitted that a forest lieu selection of the lands in controversy in this case was made. It is further admitted from the face of the amended pleading as is shown by the decision of the Secretary of the Interior, as well as by the three respective acts of approval of these selections by the Land Department, that the selection was in all respects regular. In face of these admitted facts, how can it be argued that the individual who is first in right in all particulars can

be deprived of that right! As was said by the Secretary of the interior himself:

"It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the secretary had been carried out it would have been done before the case became complicated by the counter equitable considerations arising upon the unfortunate allowance of the homestead and timber and stone entries for most of these lands."

Appellant's Transcript of Record, page 34.

Daniels did all that he could do. He accepted the offer presented by the statute. He conformed to the requirements of the Secretary of the Interior. He did all that he was able to do, but because of the "unfortunate" action of the governmental officers he is to be depirved of all his rights. Fortunately, however, this is contrary to the well established principles of law long ago announced by the highest tribunal in the land:

"It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him."

Lytle v. The State of Arkansas, 9 How. 314, 332.

In the third place, the intention of Congress as evidenced by an amendment to the Act of June 4, 1897, as well as the reasons which led to the passage

of the Act clearly establish that it was the intention of Congress to confer upon the owner of land embraced within a forest reservation, a substantial right to select other unoccupied public land in lieu of the land so included. This makes the present case one wherein each and every principle announced in the case of Weyerhaeuser v. Hoyt above cited should be applied. If these principles are so applied then it will have to be admitted that every question in the case at bar has already been determined by the court of last resort.

The Act of June 4, 1897, was amended in 1900, which amendment provides that the selections contemplated by the Act:

> "Shall be confined to vacant, surveyed, non-mineral public lands which are subject to homestead entry not exceeding in area the tract covered by such claim or patent; provided, that nothing herein contained shall be construed to affect the rights of those who, previous to October 1, 1900, shall have delivered to the United States deeds for lands within forest reservations and made application for specific tracts of lands in lieu thereof."
>
> 31 Stat. at L. 614.

The proviso just cited states in language which possesses no semblance of ambiguity, that the execution of the deed and the making of a selection creates a substantial right. To hold otherwise, would be to render the provision meaningless.

Again, the Act of Congress which repealed the

Act of June 4, 1897, contained the following proviso:

"Provided, that selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issued therefor the same as though this act had not been passed; and if for any reason not the fault of the party making the same any pending selection is held invalid, another selection for a like quantity of land may be made in lieu thereof."

33 Stat. at L. 1264, Chap. 1495; U. S. Comp. Stats. Supp., 1909, p. 581.

This proviso merely confirms the intention of Congress to confer a subsantial right and needs no comment.

If no such proviso existed, however, and we were left entirely dependent upon the Act of June 4, 1897, itself, it is clearly apparent from the face of the Act that Congress intended to confer upon the owners of land included within a forest reservation a substantial right to select other unoccupied public land in lieu thereof. The reasons for the passage of this forest lieu selection act were very clearly elucidated and expounded by Mr. Justice Lurton in the recent case of Roughton v. Knight, 219 U. S. 537.

In this connection we direct the court's attention to the following language of the learned Justice:

"Upon its face the act is neither more nor less than a proposal by the government for an exchange of claims

to land unperfected, or lands held under patents, situated within the exterior lines of a forest reservation, for an equal area of public land subject to entry elsewhere. The reasons for the provision are found in the disadvantages which result to such a settler or owner who had acquired his lands before the creation of a reservation in the public lands surrounding him. He was thereby isolated from neighborhood association and deprived of the advantage of schools, churches and of increasing value to his own land from occupation by others of the lands thus devoted to reservation purposes."

Roughton v. Knight, 219 U. S. 537, 546; 55 L. Ed. 326, 327.

As already stated, it was argued at the hearing of the demurrer to appellant's amended bill of complaint that the owner of land within a forest reservation was under no obligation to accept the offer covered by the Act of June 4, 1897, and could continue, if he so desired, to remain in ownership and possession of his land regardless of its inclusion within a forest reservation. Carrying this argument to its ultimate conclusion, it was contended that the holder of such reservation land was not therefore deprived of any vested right, and that the action of the Secretary of the Interior, with reference to the acceptance or rejection of an application for lieu land was an arbitrary power vested in him by law to be exercised at will; and he could bestow upon the lieu selector, if he so desired the gratuity which the Government offered by virtue of the Act of June 4, 1897. Whether Congress by virtue of the

Act of June 4, 1897, proposed to bestow upon the owner of lands within a forest reservation a mere gift or gratuity or whether it intended to confer upon him a substantial right of some kind is the vital question in this case.

If a gratuity was contemplated, however, then the Act of June 4, 1897, is a useless statute. It is merely an incumbrance upon our books. For if a gratuity was contemplated and the Secretary of the Interior was vested with the role of a Santa Claus to present this gratuity or withhold it at his will, the Government would merely have had to proceed with the creation of forest reservations and bestow the right of selection on those only who invited and invoked its sympathy. If the Government intended to relieve those only, whom the Secretary should designate, then it need not have passed the Act of June 4, 1897.

To argue that an individual who is deprived of a proper and adequate use of his land, but still possesses the land, has thereby lost nothing, is to argue that since matter is indestructible, the man whose house has been destroyed by fire has lost nothing, because he still possesses all of its original elements in the form of ashes.

The very fact that Congress passed and put into effect the Act of June 4, 1897, establishes beyond any possible doubt its own recognition of the deprivation which would result to an owner of land within a forest reservation, and its intention to

grant him in lieu thereof not a vague, mythical, inchoate right to obtain land elsewhere, but a definite, fixed and substantial right to select any other land which might be open to entry. Congress, of course, realized the isolation which would result from the barrier of a forest reservation. The deprivation of schools, churches, occupation and association by others and of all things which tend to give value to land, must inevitably follow the creation of such a barrier. It is a matter of common knowledge of which all courts will take judicial notice that many a tract of land within close range of a densely populated city, is valueless because of its inaccessibility. To deprive an individual of the value and use of his land is a greater deprivation than to deprive him of the land itself. In the latter instance he is deprived of the naked commodity, but no obligations flow from the deprivation, while in the first instance he still possesses the commodity, but has in addition thereto the constant expense of repair, keep and taxes.

It is therefore the contention of the appellant that the Act of June 4, 1897, conferred upon all owners of lands within forest reservations a substantial right to select in lieu of the land of which they were deprived any vacant, unoccupied land within the public domain, and that when, as in the case at bar, a selection of the lieu land has once been made, there is thereby initiated a right and interest of which the selector can not thereafter

be deprived save by his own failure to conform to the requirements of the statute from which this right emanated; that from the date of the initiation of this right the land over which the right has been exercised is thereby segregated from the public domain to the exclusion of all other interests pending the decision of the governmental officer in whom is vested the power of approval or rejection, if such approval is necessary; that when such power of approval or rejection is once invoked he is bound to determine not whether the lieu selector should be given a preference over a subsequent entryman, but whether the lieu selector has in all respects conformed to the law, for as stated by Mr. Justice White in the case of Weyerhaeuser v. Hoyt:

"The requirement of approval by the secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending the action of the secretary."

Weyerhaeuser v. Hoyt, 219 U. S. 380, 388; 55 L. Ed. 258, 261.

The language last quoted is directly in conflict with the following language of the Secretary upon which the appellee's entire title is based:

"It is believed that these applications might have been allowed not as a matter of right but in the discretion of the Secretary of the Interior, and if the instructions of the secretary had been carried out it would have been done." * * *

Appellant's Transcript of Record, page 34.

Furthermore, the Secretary's final holding in this particular was not only in direct conflict with the holding of the Supreme Court as just cited, but in direct conflict with his own prior holdings and rulings in approving the selections in question upon two different occasions.

The question to be determined in this case presents not only a far reaching proposition involving thousands of acres of the public land, but presents in addition a Federal question, such as to warrant an appeal to the Supreme Court of the United States. As above stated, the determination of the rights here involved depend upon whether or not the Act of June 4, 1897, confers a substantial right. A construction of this Act, which would support the contention of the appellant that the statute does confer a substantial right to select lands in lieu of lands lost within a forest reservation, would sustain the right of the appellant to maintain the present suit, and on the other hand a construction of the same Act to the effect, as maintained by the Secretary of the Interior, that under it the allowance of a selection is within his discretion, would defeat the present suit. Under such circumstances it is held that a Federal question is presented:

"If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. Doolan v. Carr,

be deprived save by his own failure to conform to the requirements of the statute from which this right emanated; that from the date of the initiation of this right the land over which the right has been exercised is thereby segregated from the public domain to the exclusion of all other interests pending the decision of the governmental officer in whom is vested the power of approval or rejection, if such approval is necessary; that when such power of approval or rejection is once invoked he is bound to determine not whether the lieu selector should be given a preference over a subsequent entryman, but whether the lieu selector has in all respects conformed to the law, for as stated by Mr. Justice White in the case of Weyerhaeuser v. Hoyt:

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"If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. Doolan v. Carr,

125 U. S. 618 (31 L. Ed. 844); Cooke v. Avery, 147 U. S. 375 (37 L. Ed. 209)."

Northern Pacific Railroad Company v. Soderberg, 188 U. S. 526, 528; 47 L. Ed. 575. 581.

The few cases in which this question is now presented to this court for determination, constitute but a very small part of the instances wherein the same difficulty has arisen throughout the entire United States. The injury which the appellant in this case has suffered is undoubtedly very small in comparison to the injuries which have been suffered by many poor people whose entries have been embraced within forest reservations. The trial court in the case at bar in his endeavor to distinguish the doctrine laid down in the case of Lytle v. State of Arkansas above cited, to the effect that whenever an individual in the prosecution of a right has conformed to all the requirements of the law, he should not be deprived of his rights by virtue of the erroneous action of any governmental officer, argued that this doctrine applied only in cases of homestead and pre-emption entries, upon the theory that the government had always been tender as regards the rights of such entrymen. (Transcript of Record, page 21, in Case of Daniels v. Wagner, No. 2217.)

Such argument limits itself to the narrow confines of the present cases. The effect of the ruling to be here announced and the construction to be adopted cannot be limited to this appellant. Simply because there is nothing in the present case to

show that this appellant made a homestead entry on the base lands involved in this case does not go to prove for a single moment that many homestead entries have not been made upon lands which are now embraced within forest reservations. Furthermore, there is nothing in the present case to show that the forest reservation land here involved was not originally taken up as a homestead entry. It therefore logically follows that in the determination of the question here involved it is, theoretically at least, homesteader against homesteader, and such being the case how can it be logically argued or legitimately held that the rule which protects the homesteader in one instance, where he has been deprived of rights which he has legitimately earned by conforming to the law, should not be applied in other instances where he has lost a vested right?

It is indeed a sad spectacle to travel through a forest reservation and see a few isolated homesteaders who have made their entries in hopes of future increases in value by virtue of neighborhood associations, now entirely cut off not only from associations contemplated but from all associations. To allow the rule of law which has been adopted in this case to remain in effect is to hold that many of these unfortunate entrymen, whose rights have been thus jeopardized and whose future has been blighted, can only obtain relief as the arbitrary will of the Interior Department may direct, regardless

of the act of Congress in passing a statute for their protection.

In fact, to confirm the decree in the present case is to hold that the owner of land within a forest reservation who has deeded his interest back to the United States under and in accordance with the provisions of the act of June 4, 1897, can, if the Secretary of the Interior so desires, be prevented from ever selecting any other public land in lieu of that which he has deeded to the government. He might attempt to make a selection today which the secretary could deny tomorrow, and so on without end. The opportunity which this would open for the juggling of such rights is a fact which becomes apparent by merely attempting to put into practice the doctrine which the decree of the lower court establishes. It may be that such a case is an isolated and extreme one, but by such extreme cases the practical effect of a ruling may be oftentimes best tested.

It may be contended that these observations are not applicable to the case at bar, but courts whose decisions are of such far-reaching effect as are the holdings of this court, must take such matters into consideration in adopting and laying down a rule of property which is to affect so many individuals, as will be affected by the decision which is to be rendered herein.

In view of these considerations and in view of the further consideration that the question here pre-

sented is clearly a federal question, we respectfully urge that these questions and propositions of law be certified by this court to the Supreme Court of the United States as provided by section 239 of the Act of March 3, 1911, 36 Stat. at L. 1157.

Respectfully submitted,

PLATT & PLATT,
Solicitors for Appellant.

NO. 2213

IN

United States Circuit Court of Appeals

For the Ninth Circuit

ALFRED D. DANIELS
APPELLANT

vs.

RALPH E. BUTLER AND D. W. DINEEN
APPELLEES

Brief of Appellees

Upon Appeal from the United States District Court
For the District of Oregon

STATEMENT OF THE CASE

This is a suit for decree declaring the appellee, Dineen, a trustee holding the legal title to certain real property described in the complaint in trust for the appellant. The appellant seeks to have the said appellee declared a trustee on the ground that the officers of the Land Department of the United States Government caused the patent to said land to issue by reason of an error in law and that the appellant was rightfully entitled to have the said patent issue to him instead of issuing to the patentee. A demurrer was interposed to the bill of complaint of the appellant in the court below and was sustained on the ground that the bill of com-

plaint did not state facts showing the appellant to be entitled in equity to the relief prayed for.

The case comes before this Court therefore upon the demurrer to the complaint, and it is necessary to examine the allegations of fact in the complaint only. There is incorporated in the complaint the complete decision of the Interior Department, which the appellant alleges is erroneous by reason of a mistake of law. Therefore, for the purpose of this hearing, the findings of fact in the said decision of the Secretary are conclusive as to the questions of fact.

These, briefly, are as follows:

On January 28, 1902, the lands involved were selected by the State of Oregon as school indemnity lands. But prior to the date of selection they were sold by the State to the appellant's predecessor in title. Most of the applicants to purchase lands from the State upon whose supposed interests claim was made were not persons in being, but were fictitious persons usually designated as "Dummies." The base upon which said selections were made was invalid, and the lists were cancelled in March and August, 1904. While, however, the lists were still pending and un-cancelled of record, on February 8, 1904, the appellant made application to select the land in controversy under the provisions of the Act of June 4, 1897. His selection was rejected by the local officers of the Lakeview, Oregon, Land District. The land officers based their rejections upon the ground that the selection was in conflict with certain homestead, and timber and stone applications for the same lands, and on appeal to the Commissioner of

the General Land Office the action of the Register and Receiver was affirmed, the Commissioner giving as a further reason and justification for the rejection that lieu selections were presented at the local land office prior to the cancellation of the State indemnity school selections and prior to the filing of the State's relinquishments.

The State of Oregon executed relinquishments to this land in question under its school indemnity selection lists, and these relinquishments were filed in the Lakeview Land Office. The time of filing of which is one of the questions of fact in dispute. The relinquishments bear the notation that they were filed in the local Land Office on February 10, 1904, and therefore at a time subsequent to the attempted scrip selections of the appellant and the Local Officers and Commissioner of the General Land Office found that the relinquishments were filed on said date. The Secretary of the Interior in reviewing the findings of the Commissioner of the General Land Office and the Officers of the Local Land Office, held that this fact was not necessarily controlling in arriving at a decision, but stated that in his opinion the relinquishments in question were filed at the same time the scrip applications were filed. It is submitted, however, that this is not a finding of fact by the Secretary and conclusive on the contesting parties for the reason that, as stated in his decision, he did not consider the fact necessarily controlling and his decision was reached without regard as to whether or not the scrip applications and relinquishments were filed on the same date.

The relinquishments were forwarded to the Commissioner of the General Land Office and, by letter "G," on March 7, 1904, the Commissioner advised the Register and Receiver of the Lakeview Land Office that the relinquishments had been received at Washington and accepted and the lists cancelled March 7, 1904, and directed the Register and Receiver as follows: "You will make due notation hereof on your records leaving said lands open to entry by the first legal applicants."

Subsequent to the filing of the relinquishment of the State and to the acceptance thereof by the Commissioner of the General Land Office, and the notation thereof on the records of the Local Land Office at Lakeview, Oregon, said appellee to whom later patent was issued by the Government to the lands in question, made application for the lands at the Local Land Office and his filing was accepted. At the time the filing was made and accepted the land covered thereby and which is the subject of this suit was surveyed unappropriated and public land of the United States, free and open to entry and settlement, the Local Officers having rejected the scrip application of the appellant Daniels and in the interim the State's relinquishment having been accepted and noted on the record, and the Local Officers having been instructed to accept entries therefor.

Various proceedings were thereafter had in the Land Department before the Local Officers, the Commissioner and the Secretary of the Interior, all of which were *ex parte,* the entrymen of record not being noti-

fied of the proceedings nor made parties. On August 10, 1907, the Secretary of the Interior instructed the Commissioner to order a hearing to the end that a full and further investigation might be made into the whole matter and the Commissioner was expressly advised that the various decisions of the Land Department should in no wise embarass his action in the premises. A hearing was accordingly ordered and due notice was given to all parties concerned. This was the last hearing before the Local Land Office in this matter. "The Local Land Office found that the case was not similar in all respects to that of the Oregon and California Land Co. (33 L. D., 595); that in that case there were no intervening rights or equities of other parties, while in the case under consideration the lands had been entered by *bona fide* settlers or purchasers, to many of whom final certificates had issued and in some instances even Patents had been issued." The Register and Receiver accordingly recommended that the homestead, and timber and stone entries of the various parties should be allowed to remain intact. The contest ultimately reached the Secretary of the Interior and was decided by him on February 17, 1910, being the decision incorporated in and made a part of the bill of complaint herein. The Secretary upheld the decision of the Local Officers. The Secretary, after a review of the evidence, found that the scrip applications of the appellant might have been allowed not as a matter of right, but in the discretion of the Secretary of the Interior, but that the greater equities were with the homestead and timber and stone entrymen whose fil-

ings were of record, final certificates and even patents having issued, and that the Department would not be justified in law in cancelling such entries and filings for the purpose of protecting the rights of Daniels in the lands. The Secretary said: "It matters not if Daniels' application was in all respects regular and might have been allowed when presented. Yet it was within the competency of the Land Department to dispose of the said lands to other persons and having done so, Daniels would not now be heard to question the correctness of that disposition." It is, therefore, seen that the Secretary did not find as a matter of fact that Daniels' applications were regular or that he was entitled as a matter of right or of law to the lands in question.

As shown by the Secretary's decision, all proceedings conducted by the appellant with reference to the lands in controversy were *ex parte* and the appellees were first notified and made parties at the hearing held May 25, 1908, in the Local Land Office at Lakeview, Oregon. Prior to this, however, the entries of the various entrymen to the lands in controversy, including appellees, were proceeding regularly to patent with no notice of any adverse claims to the lands they were seeking to acquire by their various entries. Final receipts and even patents had issued prior to the date that they were apprised of the contest and made parties. In fact, in the case at bar patent had issued to the entryman, the appellee, about a year before said hearing was called, and therefore the Land Department had no jurisdiction over the appellee at that time.

POINTS AND AUTHORITIES.

I.

Selections requiring approval by the Secretary of the Interior do not create any vested or equitable rights in the selector until such approval.

Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 310.

Sjoli v. Dreschel, 199 U. S. 564.

Osborn v. Froyseth, 216 U. S. 571 and 578.

Wisconsin C. R. Co. v. Price County, 133 U. S. 511.

Humbird v. Avery, 195 U. S. 480, 507.

U. S. v. Mo. etc. Ry., 141 U. S. 358, 374-5.

Sioux City etc. R. R. v. Chicago Milw. etc. R. R., 117 U. S. 406, 408.

N. O. Pac. Ry. Co. v. Parker, 143 U. S. 57.

O. & C. Ry. Co. v. U. S. 189 U. S. 103.

II.

The doctrine of relation, so called, as applied in the case of Weyerhaeuser v. Hoyt, 219 U. S. 388, is not applicable to the case at bar for the reason that the selection of the appellant was rejected by the Local Land Officers and was never approved by the Secretary of the Interior as required by law.

Campbell v. Weyerhaeuser (C. C. A.), 161 Fed. 332.

Shepley v. Cowan, 91 U. S. 337.

Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 310.

III.

A court of equity will not disturb a patent unless the error of law complained of is clear and the facts on which it is based have been determined beyond controversy.

Durango Land & Coal Co. v. Evans, 80 Fed. 431.

Lee Marchel v. Teagarden, 152 Fed. 662.

O'Reilly v. Maxon, 113 Pac. 486.

Hastings & Co. v. Whitney, 132 U. S. 357.

Leonard v. Lenox, 181 Fed. 760.

Carroll v. Safford, 3 Howard, 441, 460.

Marquez v. Frisbie, 101 U. S. 473.

Quinn v. Chapman, 111 U. S. 445.

U. S. v. Land Grant Co., 131 U. S. 375.

Garnet v. Jenkins, 8 Peters 75; 8 L. Ed. 71.

Miller v. Kerr, 7 Wheaton 1; 5 L. Ed. 381.

IV.

The Act of June 4, 1897, is an offer by the Government to exchange lands with the selector and creates no rights in the selector until the offer is accepted by the Government by the approval of the selection by the General Land Office.

Roughton v. Knight, 219 U. S. 544; 55 L. Ed. 326.

Comos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 310; 104 Fed. 20 (C. C.); 112 Fed. 4 (C. C. A.).

Minnesota v. Itaska Lumber Co., 111 N. W. 276 (Minn.).

Wm. E. Moses, 33 L. D. 333.

Clearwater Timber Co. v. Shoshone County, Idaho, 155 Fed. 624.

Wm. F. Tevis, 29 L. D. 575.

Rules and Regulations Governing Forest Reservations, Rule 18, 24 L. D. 593.

V.

The power of the General Land Department to approve selections is not merely ministerial, but judicial and gives power to decide between equities.

Williams v. U. S. 138 U. S. 514, 523-4.

Brown v. Hitchcock, 173 U. S. 478.

C. & O. Land Co. et al., 33 L. D. 600.

VI.

The policy of the Federal Government in favor of settlers upon public lands is liberal and it recognizes their superior equity to become purchasers of a limited extent of land comprehending their improvements over that of any other person.

Clements v. Warner, 24 How. 394-397.

Ard v. Brandon, 156 U. S. 537-542.

VII.

The Secretary's decision, which the appellant contends is erroneous, is attached to the complaint and made a part thereof and is controlling wherever its findings differ from the allegations in the complaint.

Greenameyer v. Coate, 212 U. S. 443.

VIII.

The final conclusion and decision as to the ultimate facts reached by the Secretary of the Interior is the authoritative decision of the Department and binding upon the parties and supersedes other decisions reached preliminary thereto.

Potter v. Hall, 189 U. S. 292, 301.

Greenameyer v. Coate, 212 U. S. 442.

IX.

(a) The Local Land Officers are required by law to reject selections unless they conform to law and regulations.

Chas. H. Cobb, 31 L. D. 220.

Santa Fe Pac. Ry. Co., 33 L. D. 161.

Arden L. Smith, 31 L. D., 184.

(b) In the case at bar the Local Officers rejected the scrip application of appellant and the decision of the Local Officers in rejecting the said selection was approved by the Secretary of the Interior, therefore the land in controversy was never segregated from the public domain.

Santa Fe R. R., 33 L. D. 161.

X.

(a) At the time the appellant attempted to make his scrip selection for the land in controversy, on February 8, 1904, said land was segregated by the State of Oregon School Indemnity Selection and at that time the ruling of the Land Department was that no entries could be made on a tract of land segregated

on the record until the Local Land Officers received authority from the Commissioner of the General Land Office to cancel the entry of record. Therefore the proffered selection was properly rejected by the Local Land Officers.

Circular, July 14, 1899, 29 L. D. 29.

James v. Germania Iron Co., 107 Fed. 604.

(b) This rule above stated established by the Circular of July 14, 1899, was later changed allowing an applicant, upon the presentation of a relinquishment from the entryman of record, to make an entry on the land prior to notification from the Commissioner of the General Land Office to cancel the entry of record.

C. & O. Land Co. et al., 33 L. D. 597 (decided June 6, 1905).

(c) The rules and decisions of the Land Department in force at the time a decision or entry is made are binding and decisive of the point in issue even though said rules or decisions may be later changed.

James v. Germania Iron Co., 107 Fed. 602.

XI.

Appellee's entry on lands in controversy was regular and proceeded to patent without notice of appellant's *ex parte* proceedings, and the hearing upon which appellant bases his rights in this suit was held many months after appellee received patent. Therefore the Land Department in said proceedings had no jurisdiction over the appellee, and the findings therein are not binding on him and this Court has no jurisdiction

to bind the appellee by a decree based upon said findings.

Brown v. Hitchcock, 173 U. S. 478.
Neal v. McMullen, 9 L. D. 522.
Webb v. Laughrey et al., 10 L. D. 304.
Ferguson v. Hoff, 4 L. D. 492.
United States ex rel McBride v. Schurz, 102 U. S. 378; 26 L. Ed. 167.

ARGUMENT.

The principle of law invoked by the appellant in this suit and by which he seeks redress in a court of equity makes it necessary to answer this question: "Did the appellant by the proceedings he initiated and followed out before the Land Department of the United States Government, as detailed in his bill of complaint, acquire a vested or equitable interest in the lands in controversy prior to the vested interest acquired by the appellee who received a patent from the United States Government to said lands?" The appellant proceeds upon the theory that when the legal title to land is passed from the United States to one party, when in equity and in good conscience and by the laws of Congress it should go to another, the court will convert the holder into a trustee for the true owner and compel him to convey the legal title.

Under the Act of June 4, 1897, the appellant applied to the Local Land Office at Lakeview, Oregon, to select certain lands, being those in controversy. His application to select was rejected by the Local Land Officers on the ground that it was in conflict with

certain homestead, and timber and stone entries and the Commissioner of the General Land Office upheld the Local Officers and gave as a further reason for rejecting the scrip application that the lands were covered by State School Indemnity selections which had not been cancelled of record on said date. It is only necessary to say at this time that various proceedings were thereafter had by the appellant with reference to the rejection of his scrip selection and that ultimately the Secretary of the Interior approved the rejection by the Local Land Officers and the lands in question were certified for patent and patent duly issued to the appellee. Appellant claims that by offering to select the lands in question and tendering to exchange therefor deed and abstract of title to the lien lands that he offered to surrender, thereby he became the equitable owner of the lands sought to be selected, notwithstanding his selection was rejected by the Local Officers and the rejection was later affirmed by the Secretary of the Interior.

The doctrine appellant seeks to invoke provides that in order to have the patentee from the Government declared a trustee for the person claiming the equitable interest in the land in question there must in fact be a double sale by the Government—one to the selector whose application was rejected, and the other to the patentee, and that the sale to the said selector must have been complete in every respect other than by securing the patent to the land. Does the appellant in the case at bar fall within this rule?

It is submitted that the appellant has not brought

himself within this rule. He seeks authority for his position in the decisions of the courts with reference to indemnity selections by railroads. He contends, as set forth in point IV of his brief, that the filing of a lieu selection segregates the land upon which the filing is made from the public domain and cuts off all intervening and subsequent rights as against the lieu selector and cities as authority therefor the case of Weyerhaeuser v. Hoyt, 219 U. S. 380, and Santa Fe Pac. Ry. Co., 41 L. D. 96. It is submitted that these cases do not uphold the appellant in the stand he has taken. It has been the uniform rule established by the United States Supreme Court that the mere filing of an indemnity selection list does not create in the selector an equitable or vested interest. Reference to the decided cases clearly show this. In New Orleans Pac. Ry. Co. v. Parker, 143 U. S. 57, the Court said:

> "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior."

And in the case of Humbird v. Avery, 195 U. S. 507, the Court held:

> "No title to indemnity lands is vested until the selection be made by which they are definitely ascertained and the selection made approved by the Secretary of the Interior."

And again in Wisconsin Central Railway Co. v. Price County, 133 U. S. 512, the following rule was enunciated:

> "Until the selections were approved there were

no selections in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity lands were incapable of identification. The proposed selections remained the property of the United States. The Government was indeed under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned, but such promise passed no title and until it was executed, created no legal interest which could be enforced in the courts."

And in the case of Sjoli v. Dreschel, 199 U. S. 565, the following language was used:

"No rights to lands within the indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior. That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under the preemption and homestead laws of the United States, and the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected with his approval to supply deficiencies within the place limits of the company's road."

A portion of the above language covering the point under discussion was cited and approved in the case of Osborn v. Froyseth, 216 U. S. 578. It is, therefore, seen that the rule of the Supreme Court of the United States is firmly established that the mere filing of an

indemnity list does not create an equitable title in the selector. Counsel contends, however, that the case of Weyerhaeuser v. Hoyt, 219 U. S. 380, decided February 20, 1911, overrules this long established doctrine and establishes a new doctrine firmly opposed to the old. It is submitted that such is not a correct interpretation of the Weyerhaeuser case. The Court said that the decision reached was not contrary to the Sjoli case. The Court said:

> "The doctrine thus affirmatively established by this court as we have said has been the rule applied by the Land Department in the practical execution of land grants from the beginning."
>
> Weyerhaeuser v. Hoyt, 219 U. S. 391.

As said by the Court, the point up for decision in the Weyerhaeuser case was, "to determine whether the land Department erred in deciding that a filed list of selections was, *after approval,* paramount to a subsequent application to purchase," and the Court held, by invoking the doctrine of relation, that if such a list was afterwards *approved* it would be paramount to subsequent applications.

It is at once apparent that the case at bar is lacking in the very element upon which the Court based its decision in the Weyerhaeuser case. For, as above quoted, the question in the Weyerhaeuser case was: "Is a filed list of selection in a land grant after approval paramount to a subsequent selection?" In the Weyerhaeuser case the railroad company filed its indemnity list which was approved by the Secretary of the Interior and patent duly issued and the Court,

in applying the doctrine of relation, held that since the selection was approved, the approval would relate back to the date of its original filing and thus cut out subsequent entrymen; whereas in the case at bar appellant's scrip application was rejected by the Local Land Officers and the rejection was approved by the Secretary of the Interior so that the very element of approval which becomes necessary to create an equitable title, and thus invoke the doctrine of relation, is lacking.

It is further urged that the doctrine established in the cases bearing upon indemnity selections is not applicable to the case at bar for the reason that a selection under the Act of June 4, 1897, is entirely different from an indemnity selection, the one being in the nature of a grant and the other nothing more than a mere offer to exchange, which will be hereinafter more fully discussed. Appellees are confident in their contention that the decision of the learned Judge in the Court below is correct and that it is entirely in accord with the conclusions reached both in the Sjoli case and the Weyerhaeuser case.

As hereinbefore stated, the doctrine upon which the appellant seeks to base his contention that the mere offer to select under the Act of June 4, 1897, created in him a vested right, is based entirely upon the conclusions reached in considering indemnity selections under railroad granting acts which, it is contended, are not at all parallel.

The Weyerhaeuser case upon which counsel for appellant places so much reliance and devotes eight pages

and a half of his argument to excerpts therefrom, holds:

> "It is beyond dispute on the face of the granting Act of July 2, 1864, c. 217, 13 Stat. 365, 367, and of the joint resolution of May 31, 1870, c. 67, 16 Stat. 378, extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits."
>
> Weyerhaeuser v. Hoyt, 219 U. S. 387.

It is thus seen that the Court in that case construed the right of the railroad company to indemnity selections as a right in the nature of a grant and a substantial right, for indeed it was a substantial right, being given to the railroad company for a valuable consideration—the construction of a railroad—and this right to select the lands lost by reason of prior appropriation was a vested right and one which the Congress or the Courts could not deprive the holder of. It was not comparable at all with the offer of the Government under the Act of June 4, 1897, to allow lieu selections. The same Court in the case of Roughton v. Knight, in considering the Act of June 4, 1897, said:

> "Upon its face the Act is neither more nor less than a proposal by the Government for an exchange of claims to land unperfected or lands held under patents situated within the exterior lines of a forest reservation, for an equal area of public lands subject to entry elsewhere."
>
> Roughton v. Knight, 219 U. S. 546.

This right given under said Act last referred to was

in fact a mere gratuity by the Government; was not based upon any valuable consideration and was not given in return for anything of value moving to the United States. It was entirely within the power and competency of Congress to withdraw the offer at any time. It attached to no specific lands and gave to persons desiring to avail themselves of its benefits no rights whatsoever until the Government, by the officers it had designated for the purpose, had accepted the offer to exchange lands under the provisions of said Act.

However, the Act of June 4, 1897 has been definitely construed and the very point in issue has been decided and, it would seem beyond a question, in the late case of Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 310. In that case the complainant's grantor selected the land in controversy under the Act of June 4, 1897, and complied with all the provisions of said Act with reference to said selection and his selection was duly accepted and received, and entered on the official records of the Land Office, and the complainant alleged that thereby he as grantee of the selector became vested with a complete equitable title to the land so selected, and was thereupon and thereby entitled to receive a patent for the land from the United States in pursuance of that selection. The defendants asserted that the land remained subject to entry, selection and purchase as mineral land and the complainant brought the suit to have his equitable title to the land protected by the Court and also to have the rights of the contesting parties finally adjudicated by a decree

of the Court. The Court held that it did not have jurisdiction to determine who was entitled to patent prior to the issuance of patent, but said:

> "But assuming that the question of issuing a patent is still and properly before the Land Department, the complainant avers that it has an equitable title to the land which will be protected by the courts. Whether the complainant has a full, complete and equitable title to the land is dependent upon considerations hereinafter stated."
>
> Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 308.

The Court then proceeded to determine whether or not the complainant had an equitable title to the land in question and as a result of this determination decided the rights acquired by the selector under the Act of June 4, 1897, making application to select, prior to the time of the approval of the selection by the Secretary. Counsel for appellant states that this decision was mere dicta. It is submitted that the decision was not dicta, but was the very question before the Court for decision. It has long been established that while the Courts will not usurp the judicial right of the Land Department to decide questions of fact prior to the ultimate adjudication of the questions involved by the investigation of the Land Department, yet it will take jurisdiction to protect the equitable rights of the complainant in the lands in question prior to a decision by the Land Department and this was the very thing that was done in the case referred to as shown by the quotation above. There was no contention in the Cosmos case that the Court did not have jurisdiction

to protect the equitable title to the land, if any, resting in the complainant. Had the Court determined that the complainant had an equitable title, it would have proceeded by its decree to protect the same. Therefore its decision as to whether or not the complainant acquired an equitable title to the land merely by filing his selection was the very point at issue and the decision of the Court thereon is conclusive.

The Court held that under the Act of June 4, 1897, the Local Land Office Officials had no authority to pass upon an application to select lieu lands and that the presentation of an application created no equitable rights in the selector prior to a favorable approval of the Land Department. Counsel for the complainant in that case made the very claims that counsel makes in the case at bar, as set forth on page 311 of the report of the Cosmos case to the effect that the complainant became the equitable owner of the lieu land selected because he had relinquished his title in fee to the United States and selected in lieu thereof vacant lands and had complied with all of the conditions of the said Act; and, further the Local Officers had accepted and received and filed his deed and his affidavit and had duly entered the selection upon the official records of the Land Office and had recited that the land was free from conflict and that there was no adverse filing entry or claim thereto. These elements were conspicuously lacking in the case at bar for the application for selection by appellant was rejected by the Local Land Officers. Complainant in the Cosmos case then asserted, as does counsel in this case, that

complainant had done all that it reasonably could do. That nothing remained on its part to do and that when such is the case equitable title vests and that it is entitled to the protection of a court of equity to preserve and defend the title acquired. Counsel further contended, as does counsel in the case at bar, that the Act of June 4, 1897, constituted a standing offer on the part of the Government to exchange lands. And that whenever a selector relinquished to the Government a tract in compliance with the Act, and made a selection of lands in lieu thereof, such offer of the Government thereupon was accepted and fully complied with, and that an equitable title to the selected land became thereby vested in the selector. It is thus seen that all of the contentions urged by counsel in the case at bar were urged in the Cosmos case, but the Court, speaking through Mr. Justice Peckham, held:

> "But even the complete equitable title asserted by complainant must, as it would seem, be based upon the alleged right of the Local Land Officers to accept the deed and approve the selection, even though such approval may be thereafter the subject of a review in the nature of an appeal from the action of the Local Officers. *There must be a decision made somewhere regarding the rights asserted by the selector of land under the Act before a complete equitable title to the land can exist. The mere filing of papers cannot create such a title.* The application must comply with and conform to the statute and the selector cannot decide the questions for himself."
>
> Cosmos Exploration Co. v. Gray Eagle Oil Company, 190 U. S. 311.

(The italics do not appear in the decision.)

And again:

"There must be some decision upon that question (the question as to whether or not the selector has complied with the terms of the Act) before any equitable title can be claimed—some decision by an officer authorized to make it."

Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 313.

The Court therefore held that the complainant had not acquired an equitable title and therefore had no standing in Court. It will be noted as above remarked that the Cosmos case was even stronger in favor of appellant Daniels' position, than the one at bar for the reason that the lieu selection of the complainant in the Cosmos case had been accepted by the Local Land Officers whereas in the case at bar the selection was rejected.

Counsel relies upon certain expressions in the opinion of Judge Ross in Olive Land Co. v. Olmstead (C. C.) 103 Fed. 568. But as was said by the learned Judge in the subsequent Cosmos case (C. C.) 104 Fed. 41, the said language was based upon an entirely different set of facts than those propounded in the Cosmos case, namely, that the former decision was made without respect to the rules promulgated by the Land Department for the administration of the Act of June 4, 1897; and held that a selector under said Act acquired no equitable rights merely by making his selection, but the selection must first be approved by the Commissioner of the General Land Office.

The Act of June 4, 1897, was a mere offer by the Government to exchange certain of its lands for lands within forest reserves. As an offer, it rests upon the same foundation as any offer of a private individual in the conduct of business affairs. No rights were acquired by any one by reason of the offer. No valuable consideration was given therefor. The Government established the procedure by which said offer could be accepted, that was that before it became binding upon the Government it must be approved by the Secretary of the Interior. Until such approval the selector acquired no vested interest in the lands sought to be selected. In addition to the Cosmos case clearly establishing this principle of law (see 190 U. S. 309), the late case of Roughton v. Knight reviews the prior decisions and says:

> "To take advantage of the proposal contained in this Act the applicant must select the land he wishes to receive in lieu and file a sufficient relinquishment of land within a forest reserve. Manifestly there must be an acceptance of the relinquishment by some one authorized to decide upon its sufficiency and an assent to the particular selection made in lieu thereof."

Roughton v. Knight, 219 U. S. 547.

In the case at bar there was no acceptance of the relinquishment, the selection was not accepted, and there was no assent to the particular selection made in lieu thereof by anyone. The Local Land Officials rejected it and the Secretary of the Interior likewise rejected it. There being no acceptance of the selection by the Local Land Officers and no approval by the Commissioner or

the Secretary, but on the contrary a disapproval, the case presents no basis for the application of the doctrine of relation as applied in the Weyerhaeuser case and therefore finds no support in that decision.

The uniform rulings in the administration of the Land Department were and are that the Local Officers should and are required to reject selections unless they conform to law and regulations. (Chas. H. Cobb, 31 L. D., 220.) At the time the appellant made application or tendered his scrip selection for the land in controversy, it was covered by the State of Oregon school indemnity lists uncancelled of record. It is true that these lists were void by reason of invalid base, but the rulings of the Department had held, and it was controlling in the case, that such entries pending segregated the land. It had also been established by the Circular of July 14, 1899, Rule 18, 29 L. D., 29, that no application should be received or no rights recognized or initiated by the tender of an application for a selection of land embraced in an entry of record until such entry should be cancelled upon the records of the Local Land Office; and it was a uniform ruling in accordance therewith that until the Local Land Office received notice from the Commissioner of the General Land Office that an entry of record had been cancelled by relinquishment or otherwise, no entry should be received for the land covered by the entry. Therefore at the time complainant offered to select the lieu lands in controversy under the law as it then existed, his selection was clearly not entitled to be received by the Local Land Officers under said ruling.

The said ruling continued to be the law until the decision of the C. & O. Land Co. et al., was made on June 6. 1905 (33 L. D. 597), and as was said in James v. Germania Iron Co., 107 Fed. 602, the rules and decisions of the Land Department in force at the time a decision or entry is made are binding and decisive of the point in issue even though said rules or decisions may be later changed. In accordance with this ruling the Commissioner of the General Land Office upheld the rejection of the appellant's scrip application by the Local Land Officers on the ground that the State's school indemnity selections were entries of record uncancelled at the time appellant made his scrip application. And it is submitted that under the ruling as entablished in 29 L. D., 29 and which continued to be the law until June 6, 1905, long after appellant had attempted to make his scrip selection, the rejection was the only action the Local Officers could have taken under the conditions as they existed. Therefore, the appellant's premature application, being rejected, gave him no rights in the land.

It is contended that on this ground alone the decision reached by the Secretary of the Interior in this matter and the issuance of patent to the appellee is decisive of the case, regardless of any construction that might be placed upon the Act of June 4, 1897.

The equitable doctrine of having a patentee declared to be the trustee for a person to whom patent should have issued except by reason of an erroneous application of the law, does not apply to the case at bar for the following reasons:

As hereinbefore stated, the authorities clearly establish with reference to this principle of law that there must be privity between the United States and the claimant, that is a contractural relationship must have been entered into. The Government must have taken such steps so as to have become bound to convey the land in question to the complainant and at a time prior to any other rights being acquired in the land by other persons. (Carroll v. Safford, 3 How, 441, 460.) But in the case at bar no such relationship existed. The complainant's scrip selections were rejected by the Local Officers and they were never approved by the Department and therefore clearly the complainant has not brought himself within the operation of the principle he seeks to invoke. A case on all fours with the one at bar is Campbell v. Weyerhaeuser, decided in the Circuit Court of Appeals, 8th Circuit, April 17, 1908, 161 Fed. 332. In that case the complainant, Campbell, repeatedly offered to the Land Department his application to enter the lands which he claimed, before the railway company's selection for indemnity lands, which had been made prior to his application, was approved by the Secretary of the Interior, but the Officers of the Land Department rejected his application each time and refused to permit him to enter the land. He never entered the land nor paid for it and his right to buy it was never recognized by the United States and he never was in privity with the United States. And for that very reason the Court reached an opposite conclusion to that reached in the case of Weyerhaeuser v. Hoyt, argued at the same time. In

the Hoyt case the Court held that the entryman, James, who had made application under similar conditions, but whose application had been received, had the prior right to the land. This decision, however, was later reversed. But in the Campbell case the Court held that the fact that Campbell's application had been rejected was fatal to his suit in equity, holding that the doctrine appellant seeks to invoke here did not apply. In the course of his opinion the Court said:

> "One who has never by acceptance of a grant, or by settlement and improvement, or by occupancy, or by entry, or by payment, placed himself in privity with the United States in title before a patent issues to another, may not maintain a bill in equity to charge the title under the patent with a trust in his favor."
>
> Campbell v. Weyerhaeuser, 161 Fed. 332 (C. C. A.)

Here the learned Judge cited a number of authorities in support of the decision and then continued:

> "The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant which is superior to the legal title in the defendant. The right under the general land laws of every qualified citizen to enter any tract of land open to entry thereunder is not, and no one can convert it into, such an interest in land by making an application to purchase which the Officers of the Land Department unlawfully deny. The right to an allowance of such an application is a privilege merely, and not an equitable interest or title. The

applicant acquires no equitable interest in the land by his application and its denial, and in the absence of such an interest no suit in equity can be maintained. Irreparable injury is conclusively presumed from the refusal of one to perform his contract to convey real property, and it is upon that ground that suits in equity to charge titles under patents with trusts for vendees and grantees are maintained; but there is no presumption of irreparable injury from the unlawful refusal of the Government to sell land in which the applicant has secured no equitable interest, and hence such a refusal will not sustain a bill in equity. The applicant pays nothing for the tract he is refused permission to buy, his loss by the refusal is measurable in damages, he may purchase another tract, and if courts of equity should entertain suits upon such applications and denials they would become courts for the production, rather than for the prevention, of a multiplicity of suits. In Smelting Co. v. Kemp, 104 U. S. 636, 647, 26 L. Ed., 875, the Supreme Court said that one who would maintain a suit in equity to charge a title under a patent with a trust in his favor must 'connect himself with the original source of title so as to be able to aver that his rights are injuriously affected by the existence of the patent, and he must possess such equities as will control the legal title in the patentee's hands.' The complainant in this suit made no such connection and he had no equities of that character."

Campbell v. Weyerhaeuser, 161 Fed. 332.

This case was affirmed by the Supreme Court of the United States, 219 U. S. 424, but it was affirmed on other grounds and the grounds upon which the

learned Judge in the Court below based his decision were not discussed.

Counsel for complainant admits that there must be an approval of complainant's selection, or at least a decision by an Officer of the Land Department competent to pass upon the question determining the questions of fact in favor of the complainant. It is clear from the authorities hereinbefore cited that under the Act of June 4, 1897, this approval cannot be made by the Local Land Officers, but must be made by the General Land Office. (Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 310.) It then becomes important to determine the extent and character of the duties imposed upon the General Land Office with reference to the approval of lieu selections under this Act. It is submitted that the authority conferred upon these officials in the performance of this duty is not different from the authority conferred in the approval of other entries or selections. This power, as has been established by the Supreme Court of the United States for many years, is not a duty merely ministerial, but is judicial in its nature and, as such, gives the officer the right to determine between contending equities. In the case of Williams v. U. S., 138 U. S., page 514, the Court was called upon to decide between the State of Nevada which had made application for a tract of land under the Act of June 16, 1880 (21 Stat. 287, c. 245), and had complied with all of the conditions prescribed by the Act, and a third party. The land was un-appropriated, non-mineral land, selected by the State as required by the Act and there was nothing to

be done that the State had not done to bring itself within the Act and it had a clear legal right to select the land in accordance with the provisions of the Act. However, a third party being misinformed and having a misunderstanding as to his rights, and in fact having no rights to the land, placed on the land large improvements. The Court held that it was within the discretion of the Land Department, under such circumstances, to withhold the land from the State of Nevada and to refuse to approve its selection and to hold the title in the general Government until such time as Congress, by special act, could enable the third party to obtain the title from the Government. The Court said in the course of the opinion, referring to the certification of the selection required to be made by the Commissioner of the General Land Office and to be approved by the Secretary of the Interior:

> "The certification after selection by the State is to be approved by the Secretary of the Interior. This is no mere formal act. It gives to him no mere arbitrary discretion, but it does give power to prevent such a monstrous injustice as was sought to be accomplished by these proceedings. It gives the power to the Secretary to deny this application of the State and refuse to approve its selection and hold the title in the Government until within the limits of existing law or by special act of Congress, a party who, misinformed and misunderstanding its rights, has placed such large improvements on the property, shall be enabled to obtain title from the Government.
>
> "We would not be misunderstood in respect to this matter; we do not mean to imply that any

arbitrary discretion is vested in the Secretary, but we hold that the statute requiring approval by the Secretary of the Interior was intended to vest a discretion in him by which wrongs like this could be righted and equitable considerations so significant and impressive as this given full force. It is obvious, it is common knowledge that in the administration of such large and varied interests as are entrusted to the Land Department, matters not foreseen, equities not anticipated and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice."

Williams v. U. S., 138 U. S. 514, 524.

The construction here placed upon the duties of the Secretary of the Interior in approving selections has since been followed by the Land Department in departmental business. In the case of California-Oregon Land Co. et al, 33 L. D., 600, the Honorable Secretary, after quoting from the above decision, said:

"In the case last cited there was complete legal right in conflict with the equity of a purchaser for value of a supposed title and the words above spoken were with reference to the powers of the Secretary under such circumstances."

It is confidently maintained, therefore, that the Honorable First Assistant Secretary was clearly within the law in his decision in the case at bar attached to and made a part of appellant's brief, that it was within the competency of the Land Department to dis-

pose of the lands in controversy to other persons than the appellant regardless of the proper construction of the Act of June 4, 1897. Even though the appellant acquired an equitable right by his proferred lieu selection, as claimed by his counsel, which, it is maintained, clearly, in view of the Cosmos case, he did not, it was entirely within the competency of the Land Department to dispose of said lands to other persons in accordance with the doctrine stated in Williams v. U. S., above cited. The equitable consideration in favor of the appellee and upon which the decision of the Assistant Secretary was based, clearly gave him the right under the law to award the lands in question to the appellee.

Those equities were as follows: At the time appellant applied to select the lands in controversy, they were covered by an existing entry of record and the Local Land Officers, and Commissioner of the General Land Office, in accordance with the regulations that had prevailed up to that time, rejected the application for the reason, among others, that the land was covered by an existing entry of record. Said Local Officers and Commissioner of the General Land Office, holding that the State's relinquishment to the lands in question had not been filed at the time and was not filed until two days thereafter. Thereafter the Commissioner of the General Land Office having received the State's relinquishment to the entry of record, notified the Local Land Officers that the entry was cancelled and the first entries thereon should be received. Thereafter the appellee made application to enter the land which at the

time was un-appropriated, surveyed, public land, open to entry. His entry was received and in due course proceeded to patent. In the meantime appellant, who was a speculator and investor in timber lands, and a person to whom the Government by numerous decisions had held that it owed no special duty, by *ex parte* proceedings, was attempting to have his lieu selection approved. His selection having been offered on February 8, 1904, it was not until May 25, 1908, over four years thereafter, that he caused a hearing to be had wherein appellee might be represented and produce evidence to substantiate his rights to the land in controversy. The appellee to whom patent issued was an individual seeking to procure a small tract of land under the laws of the United States and was such a person as the Courts had often decided was entitled to every consideration when his rights came in conflict with those companies or persons attempting to acquire large tracts of Government land, as the appellant was attempting to do in this case.

The appellant by his laches by proceeding *ex parte* and by failing to notify the appellees of the contest pending allowed the appellees to proceed with their homestead and timber and stone entries and to perfect their titles to the lands in question and even in several instances to secure patents therefor. On this ground alone the Secretary was clearly within the law in refusing to cancel such existing entries of record in order to give the lands to the appellant. Not only had final certificates issued and patents been given to entrymen, but the lands in question in most instances

and in the case at bar had been sold to other persons.

Counsel argues at some length with reference to the equities in favor of the lieu selector having acquired title from the Government to land which was later put in a forest reserve, stating:

> "It is indeed a sad spectacle to travel through a forest reservation and see a few isolated homesteaders who have made their entries in hopes of future increases in value by virtue of neighborhood associations, now entirely cut off not only from associations contemplated but from all associations." Appellant's Brief, page 51.

It is a common understanding in all the Pacific Coast states where tracts of land have been relinquished lying in forest reserves that the law of June 4, 1897, was a source of the greatest fraud perhaps that has ever been practiced upon the United States in the timber land districts and it has been charged that the law was passed in the interests of those persons who later perpetrated these frauds. And that the frauds were instigated and carried to successful conclusions by speculators who sought thereby to acquire large, valuable tracts of Government timber lands by reason of this pernicious law which allowed such schemers and speculators to acquire title through "Dummie" entrymen, as was done in this case, and other cases, and then to have such tracts placed in a forest reserve so that lands acquired for a pittance might be surrendered back to the Government and valuable timber lands acquired instead. The abuse was so apparent and flagrant that the law was repealed. Counsel's sympathy for such persons, it is

submitted, is somewhat misplaced. It is contended that homesteaders in forest reserves find their claims much more valuable, if they are desired for husbandry, the ostensible purpose for which they were acquired, by reason of the creation of the reserve. Homesteads located in forest reserves derive their chief value from the opportunities given for stockraising and from the fact that others are prevented from encroaching upon the grazing territory contiguous to them, and it is a decided advantage to have other claimants excluded. In fact the Courts of the United States have enacted a law providing that homesteads may be taken in forest reservations and such a law is in force today and homesteads are daily being acquired in forest reserves.

Not only are the equities not with the appellant in this case, but they are with the homesteaders and timber and stone entrymen who actually entered the lands in controversy when they were shown on the Government records to be open to entry and no claims pending against them, and either tilled and lived upon the lands under the requirements of the homestead law, or paid full cash consideration therefor as required by the Timber and Stone Act. These men, through the laches of the appellant, a speculator, were allowed to perfect their entries and receive patents and clearly in a court of equity their titles to the lands thus acquired should not be disturbed.

Appellant in invoking the doctrine upon which he relies must disclose in his bill of complaint clearly and without room for doubt, findings of fact which would

have entitled appellant to a patent except for an error of law made by the officials of the Land Department. He must show a superior equity to the land in question and establish that equity or the legal title will prevail. The burden is on him. If the Court is in doubt or if the scale is evenly balanced, the legal title must prevail. (Garnet v. Jenkins, 8 Peters, 75; L. Ed., 71.) And the legal title cannot be made to yield to an equity founded on a mistake of a ministerial officer. (Miller v. Kerr, 7 Wheaton, 1; 5 L. Ed., 381.) The appellant has set forth in his bill of complaint the complete decision of the Secretary of the Interior of which he complains and it therefore must be the fountain head for the findings of fact which, as appellant claims, entitled him to a patent. (Greenameyer v. Coate, 412 U. S. 443.) Appellees contend, however, that the said decision does not in its findings of fact show that appellant is entitled to any relief, regardless of the construction that may be placed upon the offer of appellant to select lieu lands under the Act of June 4, 1897. Said decision (page 23 of Appellant's Transcript of Record) has the following language:

> "The date of the filing of these relinquishments (the relinquishments of the State of Oregon to the land in controversy) is one of the disputed questions in this record and while not necessarily controlling, is, in view of this case, important and will be considered on its merits in the progress of this paper."

And again on page 32:

> "But it is evident from the facts and circumstances surrounding the incident that the scrip

applications and the State's relinquishments were in fact filed simultaneously."

The decision further states that the Register and Receiver and the Commissioner found that the relinquishments were not filed until February 10, 1904, two days after appellant's scrip application, and that they were marked filed February 10, 1904, and that it was shown that it was a custom in the Local Land Office to note the filings of relinquishments and entries of filings upon public lands on the same day they were received in the office, and that a clerk in the office gave it as his opinion that if these relinquishments had been received on February 8, 1904, instead of February 10, 1904, the filing would have been noted on the date they were received. It seems clear therefore that in view of the Secretary's statement that he did not consider the date of the filing of the relinquishments controlling, his statement that "it is evident" the relinquishments were filed simultaneously with the application of appellant is not controlling in this case, especially in view of the clear and uncontradicted evidence as reported by him that the relinquishments were not filed until February 10, 1904, and the finding by the Local Officers and the Commissioner that they were filed on said date. Counsel for appellant in his brief (Statement of Facts, page 5) says:

"The Secretary of the Interior held that although the forest lieu selections referred to were in all respects regular and should have been allowed when presented, still it was within the competency of the Officers of the United States Land Depart-

ment to dispose of the lands to whomsoever they might choose. * * *."

It is submitted that the decision of the Secretary does not so hold as will be seen from the following quotation from the decision (Appellant's Transcript of Record, page 34):

> "It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior. * * * It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition."

There are no other findings of fact in said decision which uphold the contention that appellant's selections were in all respects regular and should have been allowed when presented. Counsel for appellant in his argument quotes the Secretary as saying in his said decision " 'Daniels' application was in all respects regular and might have been allowed when presented.' " (Brief of Appellant, page 16.)

It is submitted that there is no such finding in the decision of the Secretary as is shown by the excerpts heretofore quoted from the decision of the Secretary covering this point. The Secretary's finding was not that Daniels' application was in all respects regular, but was as quoted: "It matters not if Daniels' application was in all respects regular and might have been allowed when presented." It is thus seen that

the Secretary did not hold as a matter of fact that Daniels' application was in all respects regular, but the meaning conveyed by him was "granting that it was regular," it was still within the competency of the Land Department to dispose of the lands to other persons, as was done.

Counsel for appellant again says in his brief (page 41) that various acts required to be done under the Act of June 4, 1897, were done by the appellant by reason of the fact that said acts are set up in appellant's bill of complaint and a demurrer was interposed thereto. It is submitted, however, that the demurrer does not admit any such facts as are not shown to have been found by the Secretary of the Interior in the decision attached to and made a part of the complaint. Appellees are bound to no admissions of facts not appearing in the said decision of the Secretary. As appellant must stand or fall upon the findings of the Secretary's decision, no allegations he may make that are not set forth in said decision are binding upon appellees or are admitted by them. It is needless to cite authorities to substantiate appellees' position with reference to this matter since the very doctrine counsel for appellant is seeking to invoke has for its basis the findings of facts by the Land Department showing in law that the appellees are entitled to a decree. Therefore if the facts are not disclosed in the Secretary's decision, any allegations appellant may inject into his complaint will avail him nothing. The Supreme Court of the United States in the recent case of Greenameyer v. Coate, 212 U. S. 443, showed the

fallacy of relying upon allegations in the bill of complaint which were not substantiated by the opinion of the Secretary.

It is believed, therefore, that the findings of fact in the decision complained of by appellant are not sufficient to justify this Court in saying that the appellant was entitled to patent to the lands in controversy instead of the appellee, and if the complaint fails to show sufficient facts to entitle appellant to relief, he must fail.

The maxim that he who asks equity must do equity militates against appellant, for he, after conducting the contest *ex parte* for years over the land in question, receiving back the consideration he paid for his school indemnity selections covering the land, receiving and continuing to hold the title to the land he sought to exchange for that in controversy, he now asks this Court to compel the appellee to deed to him the lands patented to the appellee and at the same time he offers no restitution to the appellee for the full purchase price he has paid for said lands, or does not offer, and cannot offer, to restore to the appellee his right of entry lost by reason of his receiving patent to the lands in question. Therefore, it is submitted that it would be inequitable for a court of equity, under such conditions, to decree that the appellee should convey the lands in question to the appellant.

For the reasons as hereinbefore set forth appellees contend that the Secretary of the Interior acted clearly within the law when he decided that it was within the

competency of the Land Department to award the lands in question to the appellee and not to the appellant. And the learned Judge in deciding this matter on the demurrer to the bill in the Court below reached a just and the only tenable conclusion in deciding that under the Act of June 4, 1897, the appellant making application to select lands, his selections being rejected, thereby acquired no vested or equitable interest in the lands sought until the General Land Office approved his application. And that he acquired no title or right to the land attempted to be selected and that it was within the power and jurisdiction of the Land Department to reject the same and award the land to the subsequent entryman under the homestead, or timber and stone act. And as a consequence that the appellant was not entitled to the relief prayed for in his bill.

It is to be noted that the case at bar differs from some other cases argued cotemporaneously herewith in this that the appellee received a patent to the land in controversy many months prior to the time that the appellant made him a party to the proceedings, which, theretofore, had been *ex parte,* patent having been acquired early in 1907 and hearing in which he was made a party not taking place until May 25, 1908. The Land Department had therefore long before lost jurisdiction of the matter which was due to appellant's laches in conducting his contest *ex parte.* Therefore, the decision of the Secretary, of which appellant complains, is in no way binding upon the appellees for the reason that the Secretary of the Interior had no jurisdiction over the appellees at the time of its rendition.

(U. S. ex rel McBride v. Schurz, 102 U. S. 378; 26 L. Ed. 167.)

It is submitted therefore that on this ground alone the patent should not be disturbed and the appellant is not entitled to a decree at the hands of this Court as against appellee.

Respectfully submitted,

ANGELL & FISHER,

Solicitors for Appellees.

The rumors reached Daniels and he promptly investigated them, finding for the first time that his title was questionable, upon the advice of his attorney, he initiated a contest against the State's selections upon which his title rested, hoping thereby to protect his purchase by acquiring an equitable preference right.

As a result of this contest, the state refunded the money which he had paid it and put in the hands of his attorney a relinquishment to the United States of all rights under its selections. Daniels then caused said relinquishments to be filed in the District Land Office, together with the Lieu Selections. There was certainly nothing reprehensible in this proceeding. Moreover, it was taken upon certain suggestions made in your said report of October 13, 1903. This report was responsive to a letter from the Governor of Oregon, September 28, 1903, wherein the inquiry was made of this department as to the means of protecting bona fide purchasers of the school indemnity lands from the State in instances where the State's selections had been cancelled for invalid base. Your offices reported among other things, and this is the same report transmitted to the Governor of Oregon, Oct. 13, 1903, that as to such selections—

while the selection is of record and uncancelled, the land is segregated thereby, and no right can be acquired by the presentation of an applicaiton therefor (29 L. D. 29), but the purchaser holding the State's relinquishment may present it with his application and thereby secure right of entry.

This is also the plain holding of this Department in the
in California and Oregon Land Company, supra, and is precisely the course pursued by Daniels in this case. His contest against the State's selection was to that end. He secured the State's relinquishments and presented them with the aforesaid applications to scrip the land.

It is true the record shows that the relinquishments were not marked, filed, in the local office until Feb. 10, 1904, which was two days after the presentation of the scrip applications.

It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been receved on February 8, instead of February 10, the filing would have been noted on the day they were received.

But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the State's relinquishments were, in fact, filed simultaneously.

The filing was by mail, and the letter of transmittal was written by Daniel's attorney, the said L. T. Barrin.

The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the action of the local officers at the time in rejecting the proffered